Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-466

CRESTWOOD EDUCATION ASSOCIATION, GORDON S. KLEMCZAK, THOMAS NOWAK, JOAN WEBER, MORRIS STOLOV, CHRISTINA HAMRICK, JOHN LUNDBERG, RICHARD HORVATH, MILES WINN. JOHN DOE and MARY ROE,
Appellant,
vs.
THE BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF CRESTWOOD,
Appellee.

MOTION TO DISMISS THE APPEAL FROM A STATE COURT IN THAT IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND ALTERNATIVELY A MOTION TO AFFIRM THE JUDGMENT OF THE MICHIGAN SUPREME COURT ON THE GROUND THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT

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OPINIONS BELOW

The opinion of the Supreme Court of Michigan is reported in 393 Mich. 616, 227 NW 2d 736. The orders denying rehearing were without opinion. The opinion of the Circuit Court for the County of Wayne is unreported. The opinion of the Michigan Court of Appeals is reported in

57 Mich. App 636 (1975). The orders denying rehearing were without opinion. Copies of the opinions and orders are set forth in the Appendix.

STATUTE INVOLVED

Michigan's Public Employment Relations Act, MCLA 423.206 *et seq*, MSA 17.455(1) *et seq*, deals comprehensively with labor relations in the public sector. Section 2 prohibits strikes in the following language:

> "Sec. 2. No person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a 'public employee,' shall strike."

A "strike" is defined in Section 1 as follows:

> "Sec. 1. As used in this act the word 'strike' means the concerted failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges or obligations of employment. This act shall not be construed to limit, impair or affect the right of a public employee to the expression or communication

> of a view, grievance, complaint or opinion on any matter related to the conditions of compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of employment."

Section 6, the provision here in issue, provides:

> "Sec. 6. Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, wilfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights, privileges or obligations of employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing, with the officer or body having power to remove or discipline such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. In the event of such request the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be undertaken without unnecessary delay. The decision of the proceeding shall be made within 10 days. If the employee involved is held to

have violated this law and his employment terminated or other discipline imposed, he shall have the right of review to the circuit court having jurisdiction of the parties, within 30 days from such decision, for determination whether such decision is supported by competent, material, and substantial evidence on the whole record."

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-466

Crestwood Education Association,
Gordon S. Klemczak, Thomas Nowak,
Joan Weber, Morris Stolov,
Christina Hamrick, John Lundberg,
Richard Horvath, Miles Winn,
John Doe and Mary Roe,
Appellants,

—vs—

The Board of Education of the
School District of Crestwood,
Appellee.

MOTION TO DISMISS THE APPEAL FROM A STATE COURT IN THAT IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND ALTERNATIVELY A MOTION TO AFFIRM THE JUDGMENT OF THE MICHIGAN SUPREME COURT ON THE GROUND THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Now Comes Royal G. Targan, attorney for Appellee, and moves this Honorable Court to dismiss the appeal from a state court in that it does not present a substantial Federal question and alternatively moves to affirm the judgment of the Michigan Supreme Court on the ground

that the questions of which the decision of the cause depends are so unsubstantial as not to need further argument, for the following reasons:

1. September 3, 1974, was the date on which the schools in the district were to reopen following the summer vacation. The teachers, members of the Crestwood Educational Association (CEA), refused to report for work. The situation thus remained in limbo until September 30, 1974, when parents in the school district initiated an action in Wayne County Circuit Court. They sued as homeowners and taxpayers in the district and as the parents of school children in the district. Their complaint requested that the Board and teachers be ordered to bargain in good faith. It was also requested that the teachers be ordered to return to work and that the Board be enjoined from firing the teachers.

By stipulation of all concerned, the Rockwells were dismissed as parties plaintiff. The litigation continued, however, on the cross-complaint of the Board. On October 8, 1974, Wayne County Circuit Court Judge Joseph G. Rashid ordered that the teachers return to work and that the Board implement the terms of its proposed salary schedule. (Appendix A.) Specific orders designed to require intensive and serious negotiating were also entered. The terms of these orders were apparently respected and were supplemented by a further injunction against striking issue by Judge Rashid on October 22, 1974 (Appendix B.)

On December 4, 1974, the teachers again refused to report for work. Contempt proceedings followed, resulting in fines against certain teachers which were paid. Sixteen days later, the Board adopted a resolution requiring the teachers to either report to their regular teaching assign-

ments on Friday, December 27, 1974, or to submit a letter of resignation by 4:30 P.M. on December 27 (Appendix C). It was further resolved that any teachers failing to exercise the option would have their employment terminated as of 11:59 p.m. on December 27, 1974. Copies of the resolution were served on the teachers by certified mail.

Of the 222 teachers in the district, 38 reported for work. One submitted a letter of resignation. The remaining 184 teachers were, by Board resolution of December 30, 1974, deemed to have terminated their employment (Appendix D.) A copy of their rights as set forth in the Michigan Public Employment Relations Act, M.C.L.A. 423.206; M.S.A. 17.455, was also forwarded to all terminated teachers. Substitute teachers were hired by the Board on a day-to-day basis.

The teachers, through the CEA, responded by filing with the Michigan Employment Relations Commission (MERC) a charge that the Board had failed to collectively bargain in good faith and had attempted by its actions to destroy and interfere with the CEA in violation of sections 7 and 10 of the Public Employment Relations Act (PERA), formerly known as the Hutchinson Act, MCLA 423.201 *et seq;* MSA 17.455 (1) *et seq.* This Charge followed a previous CEA charge against the Board. The Board of Education was absolved of all charges by the Michigan Employment Relations Commission (Appendix E).

The teachers also responded to the December 30 resolution by a letter to the Board dated January 6, 1975 (Appendix F), wherein the teachers requested individual hearings before the Board in accord with section 6 of PERA, Mich 423.206; MSA 17.455(6). It was specified in the letter that the request for a hearing was not to be construed as

a waiver of any other employee rights. On or about January 14, 1975, hearings for the discharged teachers were commenced before the Board of Education but were adjourned because of the Michigan Court of Appeals case then pending. On January 6, 1975, the CEA moved in Circuit Court for an injunction to prevent the Board from relying on the December 30 resolution and to prevent the Board from terminating any teacher in a manner other than that set out in the Teachers' Tenure Act, MCLA 38171 *et seq;* MSA 15.1971 *et seq.*

The presiding judge of Wayne County Circuit Court appointed a three-judge panel consisting of Judge Rashid, Judge Thomas Roumell and Judge George Bowles to hear the motion. Judges Bowles and Roumell decided that the provisions of the Teachers' Tenure Act controlled and that the purported firings were of no effect because of non-compliance with the Teachers' Tenure Act. Judge Rashid filed a cogent, persuasive dissent finding that PERA controlled and that the teachers were discharged in compliance with that Act.

The Michigan Court of Appeals affirmed the Circuit Court (Appendix G) decision and Appellees appealed on an emergency basis to the Michigan Supreme Court, where on April 4, 1975, the school board's action in terminating the teachers of the district was affirmed and the lower court decisions reversed. In its decision the Michigan Supreme Court referred the questions of the legality of the strike to the Michigan Employment Relations Commission. After extensive hearings, the Michigan Employment Relations Commission decided in the Board's favor and the hearings for the terminated teachers were begun immediately (Appendix E).

2. That the United States Supreme Court in *Arnett vs. Kennedy,* 416 U.S. 134 (1974) has previously held that post-job termination hearings are not a violation of the Due Process Clause of the United States Constitution.

3. That the Michigan Public Employment Employees Act, MCLA 423.206; MSA 17.455, adequately protects the public employee by providing the opportunity for hearing before the employer and fully protects the individual terminated teacher in all respects from any deprivation of his rights as guaranteed by the Due Process Clause of the United States Constitution and that said act is not unconstitutionally vague.

4. That the Appellee school board as an employer must have discretion to expeditiously remove employees from their employment capacities who hinder efficient operation of the district and that a post removal evidentiary hearing with reinstatement and back pay, should that decision be wrongful, affords the individual teacher a reasonable accommodation comporting with due process as provided by the United States Constitution.

5. That the Appellee School Board did, in fact, give notice of charges to its teachers by way of the resolutions of December 20, 1974 and December 30, 1974, so that they were adequately informed of those charges in compliance with the Fourteenth Amendment of the United States Constitution.

Wherefore Appellee prays that this Honorable Court dismiss the appeal from the Michigan Supreme Court, or alternatively, that this Honorable Court affirm the judgment of the Michigan Supreme Court.

ROYAL G. TARGAN
Attorney for Appellee
23465 Michigan Avenue
Dearborn, Michigan 48124
LO 1-2900

Affidavit

State of Michigan
County of Wayne—ss:

Royal G. Targan, being first duly sworn, deposes and says that he is attorney for the Appellee in the above cause, and that he prepared the foregoing Motion To Dismiss The Appeal From A State Court In That It Does Not Present A Substantial Federal Question And Alternatively A Motion To Affirm The Judgment Of The Michigan Supreme Court On The Ground That The Questions On Which The Decision Of The Cause Depends Are So Unsubstantial As Not To Need Further Argument, and knows the contents thereof and that the matters therein contained are true on his own information and belief.

And further deponent sayeth not.

Royal G. Targan

Subscribed and sworn to before me this 15th day of October, 1975.

(Dorothy H. Scott)
Notary Public, Wayne County, Michigan
My Commission expires: April 25, 1978.

APPENDIX A

APPENDIX ON APPEAL OF APPELLANT

TEMPORARY INJUNCTION

(State of Michigan—Circuit Court—County of Wayne)

(Filed October 8, 1974)

The Board of Education of the School District of Crestwood, Plaintiff, vs Crestwood Education Association, Gordon S. Klemczak, Thomas Nowak, Joan Weber, Morris Stolov, Christina Hanrick, John Lundberg, Richard Horvath, Miles Winn, John Doe and Mary Roe, Defendants.	No. 74 031 615 CL Hon. Joseph G. Rashid (P 19236)

Royal G. Targan (P-21265)
By: Edward L. Homeier (P-15095)
Attorneys for Plaintiff

Levin, Levin, Garvett and Dill
By: Erwin B. Ellmann
Attorneys for Defendant,
Crestwood Education Association

At a Session of said Court held in the City-County Building, Detroit, Michigan, on October 8, 1974.

Present: Honorable Joseph G. Rashid, Circuit Judge.

This cause having come on to be heard on motion of ROYAL G. TARGAN, attorney for plaintiff, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that all teachers of the CRESTWOOD SCHOOL DISTRICT shall return to work October 8, 1974 at the regularly scheduled start of the school day.

IT IS FURTHER ORDERED that the plaintiff Board of Education shall implement the terms of its proposed salary schedule of October 6, 1974 and that all teachers of the CRESTWOOD SCHOOL DISTRICT shall be paid in strict accordance with that schedule.

IT IS FURTHER ORDERED that negotiations between the parties shall resume October 8, 1974 from the hours of 6:00 P.M. to 12:00 Midnight, and that said negotiations shall continue during the above hours from October 8, 1974 until October 21, 1974 with the exception of all Sundays which may fall within that period.

IT IS FURTHER ORDERED that the entire negotiating staff of the defendant CRESTWOOD EDUCATION ASSOCIATION shall be in attendance at all negotiations meetings in accordance with the above dates and above times.

IT IS FURTHER ORDERED that the membership of the CRESTWOOD BOARD OF EDUCATION shall attend all negotiation sessions between the parties in accordance with the above schedule together with said Boards negotiating staff.

IT IS FURTHER ORDERED that the attorneys for the respective parties shall be present at all negotiation sessions in accordance with the above schedule.

IT IS FURTHER ORDERED that absence from any of the above negotiations sessions shall be deemed by this Court to be evidence of a lack of good faith bargaining, except when such absence shall be for good cause.

IT IS FURTHER ORDERED that the CRESTWOOD EDUCATION ASSOCIATION shall, no later than October 9, 1974, call a general meeting of its membership, at which time the officers of said association shall request submission by the membership the terms and conditions under which said membership will settle and ratify the terms of a master agreement covering the years 1973-74, 1974-75 and 1975-76.

IT IS FURTHER ORDERED that MR. LEONARD BENNETT, the Michigan Employment Relations Commission Mediator, or some other member of the mediation staff of said Commission, shall report to this Court periodically from October 8, 1974 to October 21, 1974 with regard to the progress of the negotiations between the parties.

IT IS FURTHER ORDERED that a true copy of this order shall be personally served upon all members of the CRESTWOOD EDUCATION ASSOCIATION and a Proof of Service filed with this Court.

Joseph G. Rashid
Circuit Judge

APPENDIX B

INJUNCTIVE ORDER

(State of Michigan—Circuit Court—County of Wayne)

(Filed October 22, 1974)

At a Session of said Court held in the City-County Building, Detroit, Michigan on October 22, 1974.

Present: Honorable Joseph G. Rashid, Circuit Judge.

This cause having come on to be heard on motion of ROYAL G. TARGAN, attorney for Crestwood Board of Education, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the teaching staff of the Crestwood School District are enjoined and prohibited from striking under any guise or color and refraining from the regular performance of their employment in accordance with the hours of employment as set forth by the Crestwood School District.

IT IS FURTHER ORDERED that this injunctive order shall remain in full force and effect until the further order of this Court.

IT IS FURTHER ORDERED that the Crestwood Board of Education shall continue to implement the terms of its proposed salary schedule of October 6, 1974 and that all teachers of the Crestwood School District shall be paid for their services in strict accordance with that schedule.

Joseph G. Rashid
Circuit Judge

APPENDIX C

Revised
Enclosure
B. 3. h. (2)
12/20/74

CRESTWOOD SCHOOL DISTRICT
DEARBORN HEIGHTS, MICHIGAN

RESOLUTION

The following resolution was introduced by Mr. Derry, and supported by Mr. Paron:

WHEREAS, the students of the Crestwood School District have had their education interrupted frequently over the past several years by illegal strikes on the part of members of this District's teaching staff; and

WHEREAS, the Crestwood School District has had its educational program interrupted by a teacher strike from September 3, 1974 through October 7, 1974, and said educational program has been further interrupted for a period of from December 4, 1974 to the present date by yet another strike; and

WHEREAS, this Board of Education has engaged in prolonged and protracted negotiations with representative (s) of the teaching staff of this District, pursuant to Act 336 of the Public Acts of 1947, and Act 379 of the Public Acts of 1965, both as amended; and

WHEREAS, pursuant to the School Code of 1955, as amended, the Board of Education is entrusted with the responsibility to provide education for the children of the District and to open and maintain schools with the requisite

teaching staff, and do whatever it deems necessary and desirable for the maintenance and improvement of public education in the Crestwood School District; and

WHEREAS, this Board of Education cannot and will not tolerate any such illegal activity on the part of its employees, and further is prohibited from approving or consenting to any such illegal activity by virtue of Act 336 of the Public Acts of 1947, and Act 379 of the Public Acts of 1965, as amended; and

WHEREAS, it has been demonstrated and represented to the members of this Board of Education that many of the District's teaching employees wish to return to the lawful duties and responsibilities as teachers within the District;

NOW, THEREFORE, BE IT RESOLVED, that all teaching staff employees of Crestwood School District shall exercise the following options relative to their employment status in the District:

1. Report to their regular teaching assignments on Friday, December 27, 1974 at the beginning of the regularly scheduled day;
2. Submit a letter of resignation to the Crestwood School District by Friday, December 27, 1974 by 4:30 p.m. in the afternoon.

BE IT FURTHER RESOLVED that should any of the Crestwood School District teaching staff fail to act in accordance with the above terms and conditions that effective 11:59 p.m., Friday, December 27, 1974 said persons' employment shall be terminated.

AYES: Burkmyre, Derry Katsarelas, Paron, Skopcznyski, Zachary

NAYS: Nicoll

RESOLUTION DECLARED ADOPTED.
12/20/74

Enclosure
B.2.b.
12-30-74

APPENDIX D

Exhiibt B

CRESTWOOD SCHOOL DISTRICT
DEARBORN HEIGHTS, MICHIGAN

RESOLUTION

The following resolution was introduced by Mr. Nicoll and supported by Mr. Paron:

WHEREAS, the Board of Education of the Crestwood School District passed a Resolution on December 20, 1974 offering the teaching staff of the Crestwood School District the option of:

1) Reporting to their regular teaching assignments on Friday, December 27, 1974, at the beginning of the regularly scheduled school day or;
2) Submitting a letter of resignation to the Crestwood School District by Friday, December 27, 1974, by 4:30 p.m. in the afternoon, and

WHEREAS, said Resolution of December 20, 1974 further stated that should any of the Crestwood School District teaching staff fail to act in accordance with the above terms and conditions that effective 11:59 p.m. Friday, December 27, 1974, said persons' employment shall be terminated; and

WHERAS, a copy of the Resolution of December 20, 1974 was forwarded by certified mail to all current teaching staff members of the Crestwood School District on December 21, 1974, and

WHEREAS, Charles Baetz, Kathleen Betke, Sandra Carol, Nancy Christie, Walter Filas, Janet Gosyzk, Michael Hungo, Carol Jones, M. Camille Lyons, David Manning, Suzanne Matras, Douglas Meyer, Suzanne Naoh, Kathryn Nied, Margaret Oswald, Susan Sellen, John Williams, Roger Wodkowski, Linda Zwick, and JoAnn Ogle, probationary teachers in the District have failed to comply with the above options and conditions as set forth above in said Resolution on December 20, 1974 and have failed and refused to report for duty to their regular teaching assignments and have participated in an illegal strike against the Crestwood School District as set forth in Act 336, Public Acts of 1947, as amended by Act 379, Public Acts of 1965, Section 1 as amended, and

WHEREAS, Margaret Aboud, Sandra Arnold, Sandra Baer, Deanne Baker, Peter Baldori, Julia Ball, Helen Barton, Mary Bauman, Karen Beauchamp, Shirley Beaudette, Julia Benedict, Donald Berg, Suzanne Berry, Ferdinand Bolser, Kay Bolser, Mary Borchanian, Ira Boroditsch, Oaklee Borrajo, Dorothy Brown, James Brown, Marilyn Brown, Sharon Buckholz, Joan Burgin, Nancy Byrum, Anne Campo, Shirley Casterline, Carol Castor, Lucille Chesney, Jean Cialone, Joan Claeys, Olympia Cook, Fay Cox, Mary I. Copperstone, Lee Craft, Katherine Craighton, Sharon Denomme, Carol DePottey, Dominic DeRose, Ros Diaz, Chris Dimanin, Vivian Drean, Carolyn Faull, James Fletcher, Virginia Forsman, Jeanne Fox, Richard Fox, William Friend, Leonard Fritz, Joseph Ganz, Carol Gatten, Evelyn Gehm, Carol Gerber, Jack Gerwin, Elaine Gingrich, George Graham, Mildred Graham, Doris Griffits,

Patricia Gruda, Nancy Gullett, H. Wallace Haggard, William Hahn, Robert Haines, Barbara Halter, Christina Hamrick, Karl Hamrick, Mary Harper, Joanne Hart, Joyce Hayes, Dwight Hendricks, Richard Horvath, Suzanne Howell, Margaret Hulter, Albrecht Jaeckle, Ann Jaworski, Lenny Jenkins, Donna Jeziorski, Duncan Jones, Marian June, Anne Kaminski, Judith Kapko, Sharon Kavanaugh, Audrey Kazanowski, Kathleen Kelly, Mary Kidle, Robert Kimball, Anna Klarman, Gordon Klemczak, Joan Kosky, Charles Kotulaki, Linda Kramer, Mary Krupp, Carolyn Kubinski, Thomas LeRoy, Deborah LeVan, John Lundberg, Catherine McCarthy, Donna McGill, Joan McHenry, Wilma McKenzie, Bruce McPherson, Janet Meloche, Kathleen Messner, Madeline Milidonis, Gerald Miller, Nancy Miner, Barton Misyiak, Michael Mitroka, Patricia Montgomery, Richard Montre, Margaret Mummery, Marjorie Murt, Thomas Nowak, Timothy O'Brien, Mary Ann Oxley, Stella Pappas, Virginia Parker, Michael Pasternak, Doris Persico, Kenneth Plonka, JoAnn Quinn, Dennis Quiton, Jamie Ratti, Lorraine Raymer, Patricia Reeves, Dolores Remington, David Robb, Victoria Roberts, Adele Robinson, Carole Robinson, Douglas Roose, Daniel Ropek, Timothy Ropek, Estelle Sadowski, Kristine Sattavara, Suellyn Sekulich, Rose Seraydarian, David Sheaffer, Adrienne Sielaff, John Skaisgir, Nancy Soutar, Janice Steele, Verla Stepp, Carol Stevens, Morris Stolov, Nancy Straub, Mary Streeter, Thomas Tate, Sandra Thompson, Beverly Todd, Doris Tom, Richard Treachler, Patricia Treachler, Maureen Ulman, Joan Vernon, Lu Wachowski, Solvej Waggoner, Joyce Wainwright, Joan Weber, Annette Weiland, Virginia Weyer, James Wheatley, Charles Wiese, Miles Winn, and Mitchel Zaleski, nonprobationary teachers have failed to comply with the above options and conditions as set forth above in said Resolution of December 20, 1974 and have failed and refused to

report for duty to their regular teaching assignments and have participated in an illegal strike against the Crestwood School District as set forth in Act 336, Public Acts of 1947 as amended by Act 379, Public Acts of 1965, Section 1 as amended, and

WHEREAS, the above-named public employees are forbidden from participating in a strike by Act 336, Public Acts of 1947 as amended by Act 379, Public Acts of 1965, Section 2, and

WHEREAS, it is the duty and responsibility of the Crestwood Board of Education to provide educational programs for the students of the Crestwood School District and that the above-named public employees have refused to act in accordance with their duties and responsibilities of employment.

NOW, THEREFORE, BE IT RESOLVED, that the above named teaching employees shall be deemed to have and are terminated from their employment status in the Crestwood School District effective December 27, 1974, at 11:59 P.M.

BE IT FUTHER RESOLVED, that a copy of this Resolution shall be mailed to the above-named persons together with a statement of said persons' rights as set forth in Act 336, Public Acts of 1947 as amended by Act 379, Public Acts of 1965.

AYES: Burkmyre, Derry, Nicoll, Paron, Skopczynski, Zachary.

NAYS: None

ABSENT: Katsarelas

RESOLUTION DECLARED ADOPTED
12/30/74

APPENDIX E

DECISION AND ORDER

State of Michigan
Employment Relations Commission
Labor Relations Division

In the Matter of: Crestwood School District, Board of Education, Respondent, and Crestwood Education Association, Charging Party.	Case No. C75 A-2
Crestwood Education Association, Respondent, and Crestwood School District, Board of Education, Charging Party.	Case No. CU74-I-19

Appearances: For Crestwood Education Association, Levin, Levin, Garvett & Dill by Erwin B. Ellmann, Esq., and Daniel J. Hoekenga, Esq.; For Crestwood Board of Education, Royal Targan, P.C., by Edward L. Homeier, Esq.

On June 26, 1975, Administrative Law Judge Schlomo Sperka issued his Decision and Recommended Order in the above-entitled matter, finding that Crestwood School District Board of Education (Respondent) had not engaged in and was not engaging in unfair labor practices within the meaning of Section 10 of the Public Employment Relations Act (PERA), 1947 PA 336, as amended by 1965 PA

379, MCLA 423.10, MSA 17.455(10), as charged by the Crestwood Education Association (Charging Party).

This unfair labor practice proceeding stems from the Michigan Supreme Court's ruling in *Rockwell* v *Crestwood School District Board of Education,* 393 Mich 616 (1975). In Rockwell, the Court held that while the Crestwood School Board had not violated the provisions of PERA in discharging teachers for striking, MERC could order reinstatement under the rules enunciated by the Court. The School Board was subsequently enjoined from effecting the discharges pending disposition of the unfair labor practice charges by MERC. Pursuant to the circuit court restraining order, expedited unfair labor practice hearings were completed before the Administrative Law Judge May 13, 1975.

The Administrative Law Judge concluded that the evidence does not support a finding of bad faith bargaining by Respondent. The Administrative Law Judge further determined that the strikes were not precipitated by unfair labor practices and that the record does not warrant the Commission's exercise of remedial discretion.

Based upon the record in this case, including transcripts, exhibits and briefs of the parties before the Administrative Law Judge and before the Commission on exceptions, we conclude that neither the Charging Party, nor the Respondent, committed unfair labor practices during the lengthly negotiations.

The unfair labor practices alleged by the Charging Party to have been committed by the Respondent, are as follows:

1. Respondent engaged in surface bargaining.
2. Respondent refused to furnish requested information to which the Charging Party was entitled.

3. Respondent refused to recognize the Association as the collective bargaining agent for the teachers in the bargaining unit.
4. Respondent imposed discipline on officers and bargaining committee members on the Charging Party because of their participation in work stoppages, action which constituted discrimination.
5. The contract between Respondent and the Michigan Association of School Boards whereby Respondent designated the Michigan Association of School Boards to handle negotiations with the Crestwood Education Association in behalf of Respondent was not entered into pursuant to law.
6. Harry Bishop, the representative of the Michigan Association of School Boards until replaced by James Greene in August, 1974, sought to, and did, cause the strikes by the teachers.
7. James Greene did not fulfill a commitment to endeavor to persuade the Crestwood School District Board of Education to expand the "perimeters" of his authority.
8. The members of the Board of Education absented themselves from a meeting with a representative of the Governor.
9. The Respondent's financial officer completed the estimated costs of the mediator's proposal in a manner to "shoot down" the proposal.

The Charge of Surface Bargaining

The Charging Party summarizes its charge of surface bargaining:

> "Respondent did not negotiate in good faith, but merely went through the external motions of motions of meetings, avoided meaningful discussions, generated mistrust and engaged in a charade for the pre-determined purpose of weaking the union and depriving its members of rights guaranteed by the Act."

The evidence does not establish that Respondent's representatives, Harry Bishop and James Greene and the others whom from time to time represented Respondent, engaged in surface bargaining during collective bargaining between May 3, 1973, and the termination of the second strike on January 4, 1975.[1]

Progress in bargaining was slow. Both sides exhibited a lack of flexibility and evidenced little willingness to compromise. But progress was made during the numerous sessions and by December, 1974, there was tentative agreement on all non-economic issues. We summarize and discuss briefly some of the specific allegations made by Charging Party to support its contention that Respondent did not engage in good faith bargaining.

(1) Charging Party complains because Bishop, who entered the bargaining at the second session, changed the procedure for exchanging proposals to which the original Respondent's representatives and Charging Party's representatives had agreed to exchange lists of items to be

[1] Collective bargaining did not end on January 4, 1975, but has continued. On July 16, 1975, Charging Party requested fact finding. A fact finder has been appointed.

opened in the negotiations. Bishop stated that he would not approve a simultaneous exchange of lists.

The wisdom of Bishop's action is not an issue. The fact that an employer's or labor organization's representatives change strategy or tactics during negotiations does not in and of itself establish unfair labor practice.

(2) Charging Party avers that Respondent's "totality of conduct" discloses failure to bargain in good faith. To support this thesis, Charging Party alleges tht Bishop and his successor, Greene, engaged in "elaborate 'shadow-boxing' to create a facade or bargaining while carrying out a predetermined purpose to extract agreement, press the union, and compel teachers to work on whatever terms Crestwood's Board saw fit to lay down."

As examples, Charging Party cites Bishop's proposal to abolish agency shop and checkoff and, after Bishop receded from this proposal, "insisting" on an indemnification clause. Because agency shop and checkoff clauses were in a contract does not prevent an employer from seeking to eliminate them in the succeeding contract through collective bargaining. Indemnification provisions, while not common, are not unknown to collective bargaining agreements.

(3) Bishop, Charging Party contends, sought to "hoist unqualified persons into the bargaining unit" by seeking to revise a provision in the prior contract that no full-time teacher be employed who did not have a Bachelor's Degree. Whatever one's view may be of the merit of this proposal, it is not illegal.

(4) Bishop, Charging Party contends, made an illegal proposal when he suggested one set of rules for members of the bargaining unit who were employed as of September 3, 1973 and a different set of rules for those employed

thereafter. Submission of such an illegal proposal, Charging Party avers, is "ipso facto, a badge of bad faith." A single proposal which may violate a law does not per se establish bad faith bargaining. Such a proposal is equally subject to an interpretation that the person who proposed it was not knowledgeable in the law. One need not be a lawyer to engage in collective bargaining.

(5) At one time Bishop proposed a salary schedule which was, Charging Party says, "an effective wage cut." There is no statutory requirement that employees' compensation must be increased each year, whether the impracticality in modern collective bargaining of proposing a wage reduction.

(6) Bishop on at least four occasions (November 5, 1973, January 8, 1974, January 29, 1974, and May 1, 1974) declared that his offers were "final." This, Charging Party posits, shows bad faith. Anyone engaged in collective bargaining knows that parties not infrequently declare a position as "final" only to subsequently relent and move toward another "final" offer or a "final final" offer. The "final" offers proposed by Bishop were not, as Charging Party contends in its brief, made "after only the most fragmentary bargaining" but were made, in each instance, after there had been substantial bargaining and movement by Respondent.

(7) Bishop, Charging Party contends, evidenced bad faith when he refused Charging Party's proposal that continuuous bargaining proceed prior to the opening of school on September 4, 1974. This, Charging Party argues, was because Respondent's purpose was to make certain that the return be "without benefit of any collective bargaining agreement." As public sector strikes are illegal, no bad faith can be charged to Bishop because he was interested in teachers manning their classes when school opened. A

delay in bargaining for a short period is not evidence of bad faith. Bishop's desire to be assured that the teachers would return to classes is understandable. (See our discussion below on the disinclination of teachers' representatives to bargain during the summer.)

(8) Charging Party avers that the Respondent unilaterally reduced the teachers' compensation when they returned to school in September, 1974. An unfair labor practice charge was filed (C-74 C-48). The Administrative Law Judge has dismissed the charges based on our Decision in *Warren Consolidated Schools,* 1975 MERC Lab Op 129 and cases cited therein.

(9) Respondent's several salary proposals are cited by Charging Party as a part of a systematic effect to avoid an agreement. We find no error in the Administrative Law Judge's conclusion that Respondent's salary proposals do not establish bad faith bargaining. The evidence discloses that Respondent's representatives were not of a "generous" frame of mind, but there is nothing in the record to disclose that Respondent's proposals were not made in good faith.

Similarly, the evidence discloses that there was as little inclination on the part of Charging Party's representatives to move downward as there was in Respondent's representatives to move upwards in their salary proposals. There is no proof of failure to bargain in good faith on the part of either Charging Party or Respondent in the salary proposals which were made during the course of bargaining.

Having thus scrutinized both the "qualitative" as well as the "quantitative" course of bargaining, we find that Respondent attempted in good faith to resolve its differences with the Association with the resources it had at its disposal. *Detroit Board of Education,* 1973 MERC Lab Op

131. The Administrative Law Judge correctly relied upon our decisions in *City of Dearborn,* 1972 MERC Lab Op 749, and *Monroe County Board of Commissioners,* 1974 MERC Lab Op 43, for the proposition that the duty to bargain in good faith requires an employer to make *a serious attempt* to reconcile its differences with the union. In *Lake Michigan Federation of Teachers* v *Lake Michigan College,* — Mich App — (April 28, 1975), the Michigan Court of Appeals recently commented upon the nature of "give and take" vis-a-vis "surface bargaining":

> "Economic requirements to the contrary notwithstanding, there is no legal requirement that every successive collective bargaining contract include salary provisions more advantageous to the employees than the contract before it, on penalty of finding that the employer engaged in unfair labor practices. To force the employer to constantly improve the salary provision of any subsequent collective bargaining contract would be to compel a 'party to agree to a proposal or require the making of a concession' contrary to the expressed terms of MCLA 423.215; MSA 17.455(15)."

The Charge of Failure to Furnish Information

Charging Party avers that failure to bargain in good faith is disclosed by Respondent's alleged failure to furnish information requested by Charging Party. Charging Party sought (1) information in support of Respondent's "inability to pay" contention and (2) information needed by Charging Party to effectuate its representation of the teachers in collective bargaining.

The evidence discloses that Respondent delayed furnishing some of the information requested, but in every

instance (with the exception of one request discussed below) Respondent complied. The Administrative Law Judge concluded correctly that the "evidence does not justify the finding of a violation." We agree with the Administrative Law Judge that the evidence does not show "that the lack of this precise information (or any of the requesting information) hindered bargaining . . ." The evidence further discloses that the Charging Party's representatives did not complain to Bishop over the alleged failure to furnish requested information.

In January, 1975, Charging Party's president and another representative requested a list of the 184 teachers who had been terminated. A secretary and another administrative employee "indicated" to the Association that the list would not be provided. The list was secured through a resident of the community. If the "indication" to which the Charging Party's witness testified was a refusal to furnish the list, it was an unfair labor practice. But the refusal occurred after the teachers had gone on strike; hence is not relevant to a determination of the issues in this case.

The Charge against Harry Bishop

A portion of Charging Party's contention that Respondent did not bargain in good faith consists of a personal attack on Harry Bishop. Charging Party stresses a letter dated May 9, 1973, written by Harry Bishop to the Crestwood Board of Education. In this letter, Bishop discusses proposed revisions in Article VI (Qualifications, Assignments and Transfers), Article IX (Sick and Personal Leaves), Article X (Professional Grievance Procedure), Article XXI (Curriculum Council), Article XXIV (Con-

tinuity of Operation), and Article XXV (Rights of the Board). Bishop stated that he had reviewed the comments made by the Crestwood Board of Education and wrote that "the six areas listed for change realistically cannot be changed in one year without traumatic repercussions both for the Board, the community and the teachers as a bargaining unit."

Bishop noted that he made no reference to economics as "we can depend on the Association to open the salary schedule, the fringe benefit schedule and other schedules where they feel they have had particular problems."

Bishop concluded:

> "The long range obligation that I am recommending is that in the areas of leave with pay, leave without pay, management rights, things of this nature that we should adopt a program of changes in this agreement that will allow you and your central office administration and the auxiliary personnel to operate the school district. This is an extremely difficult task. It's slow and it is tedious. If the Association this year in their wisdom decides to open only three or four Articles that they want to make changes in, I strongly recommend to the Board that you grant me the authority to open only three or four Articles that we want changes in."
>
> "I realize that this is a slow process, but the alternatives are not necessarily desirable to the Board."

There is nothing in the letter to suggest that the phrase "traumatic repercussions", which the Charging Party urges discloses a "transparent revelation" of "employer malevolence, insidious motive and bad faith", was an attempt to cause a strike. To the contrary, the letter disclose

that Bishop had given serious consideration to each of the Articles mentioned in his letter. He proposed several significant changes which, in his opinion, were in the best interest of the School Board and the citizens it represents. He recognized that the changes he suggested would probably be resisted strenuously by the Charging Party. He recognized that change might be a slow process, and that if the Association was modest in its contract demands, he would recommend that the Board limit its proposals to less than the changes which were, in his opinion, in the best interest of the Crestwood School Board and its constituents. There was nothing legally wrong or insidious in Bishop's proposals.

Charging Party's brief avers that there was no "rational explanation" to support Respondent's proposal to reopen Articles VI, XX, XXIV and XXV. To the contrary, the letter of May 9, 1973, which was received in evidence, discloses "rational" reasons for change, although not necessarily ones with which Charging Party or Administrative Law Judges or members of the Commission would agree.

Association witness John Lundberg testified that Bishop said: "(Y)ou (Charging Party's representative) might as well paint your picket signs, but I assure you that you are going to be on the bricks for a long time." There was no denial in the testimony that Bishop made this statement. Such a remark, while not evidencing anything more than petulance in the private sector, might be evidence to support a finding of failure to bargain in good faith in the public sector where strikes are illegal. However, there is nothing in the record to suggest that this ill-advised remark was part of a plan to cause a strike or that it had any impact on collective bargaining. In the context of this

case, Bishop's remark is not evidence of a failure to bargain in good faith.[2]

The Charge of Refusal to Recognize and Bargain with the Association

The President of the Board of Education was charged by an Association witness with having stated at a Board of Education meeting on December 30, 1974, that the Board no longer needed to recognize or negotiate with the Crestwood Education Association. The President testified that he did not recall having made a statement that the Board of Education would not recognize the Crestwood Education Association; and that he could not be sure of having made a statement that there was no responsibility or obligation to negotiate with the teachers who had been terminated.

As strikes are illegal under the Public Employment Relations Act, it is possible that Respondent had no obligation to bargain with the Association *in connection with teachers who had been terminated because they were on strike.*[3] The single statement made by the Board of Education President, if he did make it, is not an unfair labor practice.

[2] The attack by Charging Party's counsel on Bishop personally because he had once worked for the Michigan Education Association and upon Bishop's wife because she had difficulties with the Michigan Education Association, and the attack in Charging Party's brief on one of Respondent's attorneys are irrelevant, ill-advised and unfair. The material is scurrilous, should not have been admitted as evidence, and has no place in a brief.

[3] The situation on December 30, 1974, may be distinguished from facts in *Saginaw Township Board of Education, Saginaw Township Community Schools*, 1970 MERC Lab Op 127. The employees involved in *Saginaw Township* had not been terminated.

There is no evidence that the Board of Education did, in fact, refuse to recognize the Association as the representative of all the teachers, both terminated and unterminated, or that it failed or refused to engage in collective bargaining.

The Relationship between the Crestwood School District Board of Education and the Michigan Association of School Boards

The Charging Party contends that the Board of Education failed to enter into a contract with the Michigan Association of School Boards in the context of this case is not relevant to decision. The evidence establishes that Bishop and his successor, Greene, represented the Crestwood School District Board of Education in negotiations and that the Board of Education, at all times, recognized Bishop and Greene as their representatives in collective bargaining.

Respondent's counsel sees a plot in the fact that Bishop, an employee of the Michigan Association of School Boards, represented Respondent in its bargaining. We see no distinction between Bishop's serving as representative for Respondent and George R. Trudall, an employee of the Michigan Education Association, participating in collective bargaining on behalf of the Charging Party.

The Charging Party also avers that Bishop was interested in securing uniformity in certain contract provisions in the interest of the Michigan Association of School Boards rather than for the Crestwood School District and its citizens. There is nothing illegal, or necessarily unwise, in an attempt to secure uniformity in specified contract provisions among employers and labor organizations similarly situated. It is common practice in collective bargaining by both employer and labor organization representatives to

point to contract provisions, including compensation, in other bargaining units and to urge the parties in their bargaining situation to "go thou and do likewise."

The Charge against James Greene

Charging Party contends that Greene reneged on a promise to secure authority to bargain on Association proposals within a range which was higher than Greene and Trudall had previously been discussing. The charge was that Greene "reneged" on this promise is based primarily on Trudall's testimony that it was his "understanding" that Greene "was going to get authorization to bargain in a range of settlements and that Mr. Bennett (mediator) was going to make a proposal of settlement to the Board of Education." Later Trudall testified that there was a "modus operandi" for resolving issues which had not been fulfilled. The testimony arose while the parties were trying to determine whether the contract would be for two years or three years. There appears to have been, as the Administrative Law Judge found, a misunderstanding between the negotiators with respect to this issue. There is no evidence there was bad faith on the part of either the Respondent's representative or Charging Party's representative.

The evidence does not persuade that Greene failed to fulfill any commitment he had made to the Charging Party's representatives with respect to his bargaining authority.[4]

[4] The Administrative Law Judge discusses Greene's attempt to "sell" the mediator's proposal to the Board of Education. We find nothing in the record to sustain the proposition that Greene had agreed to "sell" the mediator's proposal to the Board of Education.

The Discipline of Union Officers

Several union officers and committeemen were disciplined because they had engaged in the first strike. The Administrative Law Judge is correct in his decision that imposing discipline on leaders of an illegal strike is permitted by law. The Administrative Law Judge concluded that "it is only if the finding here invalidates the strike that the consequent discipline is tainted." The Supreme Court has held, in *Rockwell* v *Crestwood School District, supra,* that the strike was illegal. Respondent acted within his legal rights when discipline was imposed on the officers and committeemen who had participated in the strike.

The Computations made by the School District's Financial Representative

Charging Party contends that estimates made by Respondent's financial officer with respect to the mediator's proposal were contrived to "shoot down" the proposal, but there is evidence to support this contention.

The Cause of the Strike

The evidence supports the Administrative Law Judge's conclusion that the strike, which commenced on December 4, 1974, was caused by a failure of the Charging Party's and Respondent's representatives to agree on economic issues. Activities in which Respondent's representatives engaged at the bargaining table and no part in causing the strike. The strike resulted because Respondent's representatives were not willing (as Charging Representative's were not willing) to accede to the economic demands of the other.

Charging Party's counsel criticizes the Administrative Law Judge for having evaluated "competing equities" in reaching his conclusion that the unfair labor practice charges should be dismissed.[5]

The Court's opinion in *Rockwell* v *Crestwood School District, supra,* requires that we consider the equities. The Court said:

> "If MERC should determine that the employing school district committed an unfair labor practice, MERC may, despite the illegality of the teacher's strike order reinstatement . . ." (p 639).
>
> "Even if it should be determined in §6 hearings that particular teachers have violated the provisions of PERA by striking and those determinations are sustained for review, if MERC orders reinstatement of striking teachers because it determines that this affirmative action will be 'effffectuate the policies of the act' and that determination is sustained on review, the teachers shall be reinstated" (p 641).

As a decision to return the teachers to work is within the Commission's discretion, it is essential that the Commission evaluate the actions of both Charging Party and Respondent.

Chairman Howlett would direct the Crestwood School District Board of Education to return the 184 striking teachers to work. In Chairman Howlett's opinion, the Commission is warranted in issuing such an order because to return the teachers to work will best "effectuate the poli-

[5] Charging Party's counsel's comments about Eishop, one of Respondent's counsel and caustic remarks in the brief which were directed at the Administrative Law Judge are unprofessional.

cies of the act." The above quotation from *Rockwell* v *Crestwood School District,* 393 Mich 616, 641, vests the Commission with this power.

Both parties, while within the legal requirements of collective bargaining, disclosed such intransigence and obstinancy that they damaged the collective bargaining process. Chairman Howlett is of opinion that the teachers should not be punished for the sins of their leaders. He recognizes that technically the members of the Association are responsible for the acts of leaders chosen by them, but the members of the Association were misled by their leaders. He is of opinion that it is better to "wipe the slate clean" so that the Crestwood School District Board of Education and the Crestwood Education Association may start anew. It is the Chairman's hope that the Crestwood School District Board of Education, the Crestwood Education Association and all representatives of the administration and the teachers will be "born again."

The Chairman recognizes that it may be urged that returning the teachers to work will tend to cause other public employees and other labor organization representatives to believe that they may act as irresponsibly as both the teachers and the Association representatives have done in this case—and by so acting "get away with it." He is of the opinion, however, that returning the teachers to work will have a contrary effect; that not only those involved in this case, but representatives of public employers and public employees and their representatives will recognize the Crestwood situation as an example of how collective bargaining should not be conducted; and that they will learn from this most unfortunate experience.

Commissioner Milmet is of the opinion that the teachers should not be returned to work. The teachers are re-

sponsible for their representatives and the actions of those representatives. Commissioner Milmet feels, as noted below, that this matter could and should have been resolved without the drastic disruption of this school system and possible permanent effect on the community. The teachers chose to use an illegal means in an effort to secure their demands. Having selected an illegal procedure, they must bear the consequences of their actions, as provided by law.

Commissioner Milmet is further of the opinion that the Commission does not have power to return the teachers to work. The Supreme Court decreed that if the Crestwood School District representatives committed an unfair labor practice, the Commission *may* order reinstatement. The paragraph on page 641 of the Court's opinion in *Rockwell* v *Crestwood School District, supra,* must, in the opinion of Commissioner Milmet be read in context with the paragraph on page 639. This limits the Commission's power to reinstate teachers only if the School District's representatives did not engage in an unfair labor practice. As the evidence establishes that the School District's representatives did not engage in an unfair labor practice, the Commission does not, in Commissioner Milmet's view, have power to direct reinstatement. There was no unfair labor practice to remedy.

The Commission is charged with carrying out the intent and policies of PERA as interpreted by the courts of this State. We believe that the withholding of services or the engaging in strikes by public employees should be discouraged and prohibited unless provoked by the unfair labor practices of the public employer. We likewise strongly emphasize the affirmative duty of every employer to engage in good faith bargaining to carry out the policies of the Act so as to promote labor peace and to secure a just

and equitable settlement of all disputes between public employees and their employers.

A review of the very extensive transcript and record in this cause, including a summary of the history of the negotiations between these parties, namely, the Crestwood School District and the Crestwood Education Association, indicates over a period of years an atmosphere of distrust, personal attacks, use of intemperate languauge and failure to commuicate clearly and explicitly by the negotiators with members of the School Board and members of the Teachers Association respectively.

Further, the record is replete with indications of undue militancy on the part of both parties. There has been a tendency to avoid the issues and to become emotional and personal during the negotiations. Both parties have been guilty of using delaying tactics when it appeared to them to be to their advantage. Both parties patently lack a sense of urgency to accomplish a successful negotiation of a contract. It appears to us that the parties should be reminded of the intent and the policies of PERA. The intent and policies of this Act are to prohibit and/or discourage strikes, to allow the employees to freely engage in collective bargaining and to proscribe unfair labor practices. The atmosphere of hostility, destructive to these policies and the intent of the Act, must come to an end. Five years of rancor, personal attack, hostility and court litigation is enough. The interests of the students, parents and the public demand a cessation of hostilities.

Further comment should be made as to the reluctance or refusal of both parties to extensively engage the services of mediation, fact finding or arbitration during the course of their negotiations to assist them to arrive at settlement. The purpose and the policies of the Act is to reach settle-

ment. It is a failure to all parties concerned when a withholding of services, work stoppage, lockout or a strike does occur. In our opinion, this would not occur if possible alternatives were thoroughly exhausted. The record herein discloses that the School Board at no time expressed its desire for fact finding or arbitration. The record further discloses that the Association was reluctant to use fact finding because, from its point of view, of an unfortunate experience in the past. For both parties, the past must be forgotten. The rancor and bitterness and disappointments of the past must be set aside. The parties here, as well as all other parties subject to the provisions of PERA, must *engage in meaningful collective bargaining* to carry out these purposes and policies.

Obviously, reasonable people can differ. If the parties have negotiated and reached an impasse in good faith, then there should not be any hesitation by either party to affirmatively seek assistance of mediation, fact finding and, perhaps, arbitration. It is apparent that neither of the parties endeavored to maximize the use of other governmental agencies or individuals to assist them in arriving at a settlement. We deplore the slowness of the bargaining between the parties. Both parties took extreme positions in their negotiating and then slowly, ever so slowly negotiated their way to common areas of agreement. The demands of the Union were extraordinarily high under the circumstances. The response of the Board was extremely nominal in its initial offer. Then the lack of communication, the mistrust, the hostility and the militancy set in. Everyone became stubborn and hostile, oblivious to the purposes and policies of the Act and the welfare of students, parents and the public. It appeared as though members of the parties were engaged in their own personal embellishment, rather than

seeking a settlement of the issues. The refusal to fully cooperate with government officials who were desirous of bringing hostilities to an end indicated to this Commission that responsibilities inherent in public employment bargaining and obligations toward the public were recklessly disregarded. This, too, must pass.

We intend to look very carefully in the future to the activities of all the parties in carrying out the policies and intent of PERA. Delay in negotiations, or a tendency to negotiate in a manner calculated to inflame the passions of the parties will be viewed critically by this Commission. Likewise, the failure of the parties to utilize to the maximum extent necessary the services of mediation, fact finding and arbitration will be viewed as indicating a lack of good faith to carry out the intent and policies of PERA.

We strongly affirm the obligation of public employees and public employers to negotiate in good faith; that in order to do so there must be an exchange of all necessary, accurate and factual data required to bargain. Deceptiveness in the furnishing or compilation of factual data between the parties should not, and will not, be tolerated by this Commission.

After the furnishing of this data within a time frame where both parties are fully appreciative of the sense of urgency so as to avoid a withholding of services, work stoppage, slowdown, lockout or strike must be observed by both parties. They should not, and cannot, utilize delay for the purposes of "jockeying" for position. In the event an impasse is reached where reasonable people can differ, we strongly urge and insist upon the use of mediation, fact finding and arbitration so as to prevent work stoppages, withholding of services, lockouts or slowdowns by the public employees of this State.

While stating our opinion and intentions, we must point out that the responsibility rests equally with public employers and labor organizations. They *must* furnish all necessary required data; they *must* meet regularly; they *must* maintain a sense of urgency in their negotiations and avoid "crisis" bargaining; and they *must* bargain in good faith to reach a fair and just collective bargaining agreement. This, too, is a policy of the Act that we will watch carefully. We will not condone any actions by public employers or labor organizations, their agents or attorneys, that tend to subvert the policies of PERA.

As the Chairman and Commissioner Milmet are divided on the issue as to the exercise of the Commission's discretion as to ordering the reinstatement of the teachers, the Commission adopts the recommended Order of the Administrative Law Judge.

Commissioner Ellman did not participate in this case.

ORDER

It Is Hereby Ordered that the charges, as amended, and the complaint in both cases herein, shall be and are hereby dismissed, Chairman Howlett dissenting on the result of this Order which necessitates that the teachers not be reinstated.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/ Robert G. Howlett, *Chairman*

/s/ Morris Milmet, *Commissioner*

Dated: July 31, 1975

APPENDIX F

EXHIBIT C

Law Offices
Levin, Levin, Garvett and Dill
1250 Penobscot Building
Detroit, Michigan 48226

—o—

(313) 962-9400

January 6, 1975

David A. Goldman
Leonard J. Grabow
Gordon I. Ginsberg
Erwin B. Ellmann
Harvey J. Wax
Robert J. Finkel
Daniel J. Hoekenga
Wallace K. Sagendorph
Earl Philip Adamaszek
James A. Hiller
Dennis A. Dettmer
Eli Grier
Marshall W. Anstandig

Cable Adress
"Legad"

Saul R. Levin
(1898-1960)
Bayre Levin
(1899-1951)
Earlmont H. Dill
(1901-1963)
Morris Garvett
(1893-1971)

Mr. Frank Skopczynski
Crestwood School District
Board of Education
1501 N. Beech Daly Road
Dearborn Heights, Michigan

Dear Mr. Skopczynski:

In behalf of those teachers enumerated in the resolution of December 30, 1974, demand is hereby made pursuant to the Public Employment Relations Act for a separate hear-

ing for each individual, and in accord with constitutional standards before a fair and impartial tribunal.

This demand is not to be construed to recognize the valvalidity of any action of the Board or to waive any rights of any teacher pursuant to the Public Employment Relations Act, the Tenure of Teachers Act, or any other rights which they may have either individually or collectively.

Levin, Levin, Garvett and Dill
/s/ Edwin B. Ellman

EBE/ks

APPENDIX G

DECISION OF COURT OF APPEALS

George N. Rockwell, et al, Plaintiffs v The Board of Education of the School District of Crestwood,
Defendant-Cross-Plaintiff-Appellant,

Crestwood Education, et al,
Defendants-Cross-Defendants-Apellees.

Docket #22735

(State of Michigan—Court of Apeals—Division 1)

(Filed January 17, 1975)

Before: V. J. Brennan, P.J. Bashara and M. J. Kelly, JJ.
Per Curiam

This is an appeal from the decision of a three-judge panel of the Wayne County Circuit Court. The panel held, by a 2 to 1 decision, that some 184 teachers had been improperly fired by the Board of Education of the Crestwood School District. The panel ordered that the teachers be reinstated. We granted the Board an emergency appeal

and issued an order staying the relief granted in Circuit Court. Because of the compelling importance of this case, we ordered accelerated filing of briefs and early disposition of the cause. In spite of the obvious time limitations we have been favored with incisive briefs by the parties and the amici curiae.

The parties have been without a collective bargaining agreement since August of 1973. Btween that time and this, negotiations have proved futile.

September 3, 1974, was the date on which the schools in the district were to reopen following the summer vacation. The teachers, members of the Crestwood Education Association (CEA), refused to report for work. The situation thus remained in limbo until September 30, 1974, when plaintiffs initiated an action in Wayne County Circuit Court. They sued as homeowners and taxpayers in the district and as the parents of school children in the district. Their complaint requested that the Board of Education be ordered to bargain in good faith. It was also requested that the teachers be ordered to return to work and that the teachers be ordered to return to work and that the Board be enjoined from firing the teachers.

By stipulation of all concerned, the Rockwells were dismissed as parties plaintiff. The litigation continued, however, on the cross-complaint of the Board. On October 8, 1974, Wayne County Circuit Court Judge Joseph G. Rashid ordered that the teachers return to work and that the Board implement the terms of its proposed salary schedule. Specific orders designed to require intensive and serious negotiating were also entered. The terms of these orders were apparently respected and were supplemented by a further injunction against striking issued by Judge Rashid on October 22, 1974.

On December 4, 1974, the teachers again refusd to report for work. Contempt proceedings followed, resulting in fines against certain teachers which were paid. Sixteen days later, the Board adopted a resolution requiring the teachers to either report to their regular teaching assignments on Friday, December 27, 1974, or to submit a letter of resignation by 4:30 p.m. on December 27. It was further resolved that any teacher failing to exercise the option would have their employment terminated as of 11:59 p.m. on December 27, 1974. Copies of the resolution were served on the teachers.

Of the 222 teachers in the district, 38 reported for work. None submitted a letter of resignation. The remaining 184 teachers were, by Board resolution of December 30, 1974, deemed to have terminated their employment. Substitute teachers were hired by the Board on a day-to-day basis, however, the Board conceded at oral argument that as of this date the classes are not fully-staffed on a full-time basis.

The teachers, through the CEA, responded by filing with the Michigan Employment Relations Commission (MERC) a charge that the Board had failed to collectively bargain in good faith and had attempted by its actions to destroy and interfere with the CEA in violation of §§7 and 10 of the Public Employment Relations Act (PERA), formerly known as the Hutchinson Act, MCLA 423.201 *et seq;* MSA 17.455(1) *et seq.* This charge followed a previous CEA charge against the Board. Both charges are presently pending before MERC and are not directly involved in the case before us.

The teachers also responded to the December 30 resolution by a letter to the Board dated January 6, 1975, wherein the teachers requested individual hearings before

the Board in accord with §6 of PERA, MCLA 423.206; MSA 17.455(6). It was specific in the letter that the request for a hearing was not to be construed as a waiver of any other employee rights. On January 6, 1975, the CEA moved in Circuit Court for an injunction to prevent the Board from relying on the December 30 resolution and to prevent the Board from terminating any teacher in a manner other than that set out in the Teachers' Tenure Act, MCLA 38.71 *et seq;* MSA 15.1971 *et seq.*

The presiding judge of Wayne County Circuit Court appointed a three-judge panel consisting of Judge Rashid, Judge Thomas Roumell and Judge George Bowles to hear the motion. Judges Bowles and Roumell decided that the provisions of the Teachers' Tenure Act controlled and that the purported firings were of no effect because of non-compliance with the Teachers' Tenure Act. Judge Rashid filed a cogent, persuasive dissent finding that PERA controlled and that the teachers were discharged in compliance with the Act. It is from the order granting CEA's motion for an injunction that the Board appeals.

It is well settled that there is neither a comon law nor a constitutional right of public employees to strike. *City of Detroit* v *Division 26, AASER,* 332 Mich 237; 51 NW2d 228 (1952). Moreover, in this State, public employees are specifically denied the power to strike by §2 of the Public Employment Relations Act.

That Act defines a public employee as, among others, a "person in the public school service." MCLA 423.202; MSA 17.455(2). It is undisputed that these teachers are public employees subject to the provisions of the Act.

Section 1 of the Act defines a "strike" as:

> "Strike means the concerned failure to report for duty, the wilful absence from one's position, the stop-

page of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in the conditions, or compensation, or the rights, privileges, or obligations of employment." MCLA 423.201; MSA 17.455(1).

The circuit court panel found, and we agree, that the teachers were engaged in a strike prohibited by the Act and thus, we believe, became subject to the provisions of §6 of PERA.

By necessary inference that section gives public employers the power to discipline or remove employees who engage in a strike. It refers to "the officer or body having the power to remove or discipline such employee," and refers to cessation of compensation or imposition of other discipline. Furthermore, §6 says, "If the employee involved is held to have violated this law and his employment terminated * * *." MCLA 423.206; MSA 17.455(6). As originally enacted, PERA provided for automatic termination of employment. 1947 PA 335, §4. While that provision was repealed by 1965 PA 379, we do not believe it in any way detracted from the Board's authority in this area. We believe it simply made the discipline of a striking employee discretionary with the employer under §6.

Our central concern on this appeal, once having determined that the PERA grants the Board the authority to discharge a striking teacher is to determine the manner in which such disciplinary action may be taken. In performing our duty in this regard we are guided by what our Supreme Court said in *Wayne County Civil Service Commission* v *Board of Supervisors,* 384 Mich 363, 373; 184 NW2d 201 (1971),

"This is not to say that the act of 1965 repeals outright the act of 1941. Respecting as always our long since declared and regularly maintained rule that repeals by implication are not favored, and that it is only when the two measures in view are so incompatible that both or all cannot fully stand, we can only find that this is a striking instance for application of that rule which, back in 1877, was written into the Court's opinion of *Breitung* v *Lindauer* (1877), 37 Mich 217, 233:

"'The rule is that the latter act operates *to the extent of the repugnancy,* as a repeal of the first, or, if the two acts are not in express terms repugnant, yet if the letter *covers the whole subject of the first,* and contains new provisions showing that it was intended as a substitute, it will operate as a repeal.'" (Footnote Omitted.)

The important point made in the above quotation is that the law does not favor repeals by implication. It is only where no reasonable construction of the statutes involved permits of reconciliation or allows the purpose of each to be served that a repeal by implication is properly found to have occurred. *Detroit Police Officers Association* v *City of Detroit,* 391 Mich 44; 214 NW2d 803 (1974).

In an attempt to perform our function in this regard, we have exhaustively considered the contentions of all parties regarding the proper interpretations of these two statutes. MCLA 423.206; MSA 17.455(6) provides:

> "Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, wilfully absents himself from his po-

sition, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing, or coercing a change in the conditions or compensation, or the rights, privileges or obligations of employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing, with the officer or body having power to remove or discipline such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. In the event of such request the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be undertaken without unnecessary delay. The decision of the proceeding shall be made within 10 days. If the employee involved is held to have violated this law and his employment terminated or other discipline imposed, he shall have the right of reivew to the circuit court having jurisdiction of the parties, within 30 days from such decision, for determination whether such decision is supported by competent, material and substantial evidence on the whole record.

In contrast the Teachers' Tenure Act provides, in pertinent part:

> "The controlling board, if it decides to proceed upon such charges, shall furnish the teacher with a written statement of the charges including a statement of

> the teacher's rights under this article, and shall, at the option of the teacher, provide for a hearing to take place not less than 30 nor more than 45 days after the filing of such charges." MCLA 38.102; MSA 2002.
>
> "Any hearing held for the dismissal or demotion of a teacher, as provided in this act, must be concluded by a decision in writing, fifteen [15] days after the termination of the hearing. A copy of such decision shall be furnished the teacher affected within five [5] days after the decision is rendered." MCLA 38.104(f); MSA 15.2004(f).
>
> "A teacher who has achieved tenure status may appeal any decision of a controlling board under this act within 30 days from the date of such decision, to a state tenure commission." MCLA 38.121; MSA 2021.

It is our considered opinion that irreconciliable repugnancies exist between these acts in only two respects:

(1) §6 reduces the time for hearing and decision to the 10 day provisions stated therein;

(2) §6 provides an alternate appellate route—to Circuit Court, rather than to the State Tenure Commission, as provided for in Article 6, §1 of the Tenure Act.

In these two respects, and these two respects only, the provisions of §6 of the PERA prevail. The remainder of the provisions can be read as being consistent with one another.

Under §6 of PERA the school board has the power to determine whether a school teacher has engaged in the type of activity proscribed by the Act. Once the Board has made such a determination, it is required to foliow the

procedures outlined in the Teachers' Tenure Act if the Board desires to discipline the teacher. In the event formal written charges are filed against the teacher and served upon him or her in conformance with MCLA 38.102; MSA 15.2002, the teacher shall have 10 days within which to request a formal hearing. If such a hearing is requested, it shall be held in accordance with the provisions of the Teachers' Tenure Act. After the Board reaches a determination upon such a hearing, the employee is entitled to review in accordance with the provisions of §6 of PERA.

The Board argues that teachers involved in a labor dispute have thereby discontinued their services within the meaning of Article V §1 of the Teachers' Tenure Act. This argument is without merit. In *Holland School District* v *Education Association,* 380 Mich 314; 157 NW2d 206 (1968), the teachers argued, *inter alia,* that since there was no contract they, as a matter of law, could not be employees and thus could not be subject to the injunctive powers of the court. The Supreme Court by remanding the case for further factual determinations on the issuance of an injunction necessarily concluded that the teachers were employees. The inference drawn from *Holland, supra,* and we so hold, is that teachers involved in a labor dispute have not discontinued their services. See 1970 OAG No. 4704, p 150.

The school board, by not following the procedures outlined above, discharged the striking school teachers in a procedurally improper manner. That being the case, it is clear that the teachers are entitled to be reinstated. The case should not end here, however.

In the bitter, sanguinary struggle between these parties, it is apparent that the orders of the trial judge were blatantly ignored. The purpose of the Tenure Act is to pro-

hibit the arbitrary abuse of power and the teachers herein seek to interpose that Act to vindicate their own arbitrary abuse of the lower court orders. All three judges in the trial court agreed that both parties were in "open, flagrant definance and in violation of [Judge Rashid's] orders." The court below observed that we are "reaping the wild whirlwind of a very inadequate law as pertaining to such disputes." However, in light of the present confusion prevailing in this area, the lower court judges obviously felt restricted in fashioning an appropriate remedy to handle this all to familiar situation.

We must resist abuses of the judicial system wherein the parties seem to want to handle the power of the court like a spigot; turn it off when it doesn't suit their interests (ignore, violate, flaunt injunctive orders), turn it on when it appears to suit their interests (seek enforcement of a return to work order which has been standing in prominent violation.)

The lower court here attempted in various way to bring this dispute to a speedy conclusion so that both the teachers and the board could get back to their primary function—educating the children enrolled in their schools. Both sides to this dispute, through their intransigence, have demonstrated to the satisfaction of this Court that to simply order the reinstatement of the fired teachers would not adequately resolve any of the problems underlying this controversy. What is needed is the establishment of a procedure whereby these issues may be resolved so that the teachers, the board, the children and the community may begin the process of healing the wounds which have festered for so long. In pursuit of this end we hereby invoke the broad range of powers vested in this Court by GCR 1963, 820.1(7) and MCLA 600.310; MSA

27A.310 and order that the parties effect a full resumption of educational activities in the Crestwood School District by Monday, January 20, 1975, in conformance with the order of the Wayne County Circuit Court dated January 10, 1975, the stay of which is hereby dissolved.

The exigencies of this situation require us to order, under GCR 1963, 820.1(7) and MCLA 600.310; MSA 27A.310, that within 10 days from the date of this opinion the lower court shall order compulsory arbitration to resolve the remaining issues which separate the parties. The number of the arbitrators, the method of their selection and the time limitations are left to the discretion of the trial court.

Affirmed as modified; remanded for proceedings consistent with this opinion.

No costs, a public question being involved.

APPENDIX H

NOTE: Where possible, a syllabus (headnote), such as this, will be released at the time the opinion is released. This syllabus is *not* a part of the opinion of the Court but has been written by the Supreme Court Reporter as a summary of the case for the convenience of readers. See *United States* v *Detroit Lumber Company,* 200 US 321, 337; 26 S Ct 282; 50 L Ed 499 (1906).

ROCKWELL v CRESTWOOD SCHOOL DISTRICT BOARD OF EDUCATION

Docket No. 56618. Argued March 4, 1975 (Calendar No. 1).—Decided April 4, 1975.

After a prolonged labor dispute between the Crestwood School District Board of Education and the Crestwood Education Association, the teachers' union, during which charges of unfair labor practices were filed by the union with the Employment Relations Commission (MERC), the teachers did not report for work when the school year commenced on September 3, 1974. George W. Rockwell and Violet P. Rockwell brought this action against the board and the union to compel resumption of school operations. The original complaint was dismissed by stipulation and the action proceeded on the cross-complaint of the board. Injunctive orders were issued and classes resumed, but in December the teachers again did not report for work. The school board adopted a resolution requiring the teachers to return to work or submit a letter of resignation by December 27, and further providing that the employment of teachers who failed to comply would be terminated at the end of that day. By resolution of the board on December 30, the teachers who had not returned were deemed to have terminated their employment; substitute teachers were hired, and the schools were reopened. The union filed an amended charge of unfair labor practices with the MERC. The Wayne Circuit Court, George E. Bowles and Thomas Roumell, JJ. (Joseph G. Rashid, J., dissenting), found that the failure of the school board to proceed in accordance with the teachers' tenure act, MCL 38.71, *et seq;* MSA 15.1971 *et seq*, by having a hearing before the teachers were discharged required their reinstatement. The Court

of Appeals, V. J. Brennan, P.J., and Bashara and M. J. Kelly, JJ., affirmed (Docket No. 22735). The Board of Education appeals.

Held:

1. The public employment relations act (PERA), MCL 423.201 *et seq;* MSA 17.455(1) *et seq,* was intended by the Legislature to be the governing law for public employee labor relations, and to the extent that it conflicts with the teachers' tenure act, the PERA governs.

2. A teacher, including a teacher on continuing tenure, who strikes in violation of the public employment relations act may be disciplined without a prior hearing under §6 of that act.

3. The teachers did not cease to be employees by striking; their employment could only be terminated in accordance with the procedures set forth in §6 of the PERA, but the action of the school board discharging teachers for striking in violation of the provisions of the PERA prior to the hiring of the replacements was not violative of that act.

4. If the MERC should determine that the employing school district committed an unfair labor practice, MERC may, despite the illegality of the teachers' strike, order reinstatement.

5. The hearings on the discharge of each teacher required by §6 of the PERA may not proceed or, if the parties agree, be deferred until determination by the MERC of the unfair labor practice charges.

6. Even if it is determined in the hearings under §6 of the PERA that particular teachers have violated the provisions of the act by striking, if the MERC orders re-

instatement because it determines that reinstatement will best effectuate the policies of the act and that determination is sustained on review, the teachers shall be reinstated.

7. The MERC is authorized to consider and decide the union's request that it petition the circuit court for appropriate temporry relief, rather than to deny it as a matter of policy.

Williams, J. (T. M. Kavanagh and Swainson, JJ., concurring), dissented on the grounds that the PERA does not contain a provision for discharge of employees that conflicts with and repeals the discharge provisions of the teachers' tenure act, but sets up a procedure for determining whether an employee violated the provisions of the PERA after discharge or discipline proceedings under a body of rules outside the PERA, in this case in the teachers' tenure act. Consequently, the circuit court and Court of Appeals were correct, and should be affirmed, except that portion of the Court of Appeals' opinion which required compulsory arbitration.

57 Mich App — ; — NW2d — (1975) reversed.

OPINION OF THE SUPREME COURT OF MICHIGAN

(Filed April 4, 1975)

Before the entire Bench, J. Levin. The issue is whether school teachers who strike may be discharged without a prior hearing.

Resolution requires construction of the public employment relations act (the PERA)[1] in relation to the teachers' tenure act[2] and consideration of the teachers' claim that the PERA is violative of the Due Process Clause unless construed to require a prior hearing.

Section 6 of the PERA provides that public employees who, in concerted action with others, in support of efforts to obtain a change in compensation or other conditions of employment, fail to render services shall be deemed on strike. If the employee is disciplined by his employer for striking, he is entitled, on request, to a determination whether he violated the provisions of the act. The request is to be maide "within 10 days *after* regular compensation of such employee has ceased or other discipline has been imposed". (Emphasis added.) If the employee is found

[1] MCLA 423.201 *et seq.*; MSA 17.455(1) *et seq.*

[2] MCLA 38.71 *et seq.*; MSA 15.1971 *et seq.*

to have violated the act, he may seek review by the circuit court.[3]

In contrast, the teachers' tenure act requires a hearing *before* discharge. That act provides that a teacher on continuing tenure may be discharged or demoted "only for reasonable and just cause, and only *after* such charges, no-

[3] Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, wilfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights, privileges or obligations of employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing, with the officer or body having power to remove or discipline such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. In the event of such request the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be undertaken without unnecessary delay. The decision of the proceeding shall be made within 10 days. If the employee involved is held to have violated this law and his employment terminated or other discipline imposed, he shall have the right of review to the circuit court having jurisdiction of the parties, within 30 days from such decision, for determination whether such decision is supported by competent, material and substantial evidence on the whole record." MCLA 423.206; MSA 17.455(6).

tice, hearing, and determination thereof".[4] (Emphasis supplied.)

The circuit court found that the failure of the school board to proceed in accordance with the teachers' tenure act required reinstatement of the teachers who were discharged. The Court of Appeals affirmed.[5]

We conclude that a teacher, including a teacher on continuing tenure, who strikes in violation of the PERA may

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[4] MCLA 38.101; MSA 15.2001.

The Union also relies on § 569 of the School Code of 1955 providing:

"Any board after a teacher has been employed at least 2 consecutive years by the board may enter into a continuing contract with such teacher if the teacher holds a permanent or life certificate. A continuing contract is a contract which shall remain in full force and effect, as provided in the rules and regulations of the board, until the teacher resigns, elects to retire, is retired, or is dismissed for reasonable and just cause after a fair hearing." MCLA 340.569; MSA 15.3569. The foregoing language, with minor style variations, was added by 1943 PA 96 to a compilation of school laws which preceded the adoption of the School Code of 1955.

The last clause of this 1943 enactment, "dismissed for reasonable and just cause after a fair hearing", parallels Art IV. § 1 of the earlier enacted teachers' Tenure Act (1937 PA [Ex Sess] 4) which provides that a teacher on continuing tenure may be discharged or demoted "only for reasonable and just cause, and * * * hearing * * *". MSLA 38.101; MSA 15.2001.

The teachers' tenure act proivdes that the teacher shall be provided with written charges and, at the option of the teacher, for a hearing on these charges "not less than 30 nor more than 45 days after the filing of such charges". MCLA 38.102; MSA 15.2002. Although the charging board may suspend the accused teacher from "active performance" pending resolution of the charge, it may not withhold pay or otherwise sever the employment relationship before the hearing MCLA 38.103; MSA 15.2003. A tenured teacher may appeal "any decision of the board and be provided a hearing before the State Tenure Commission." MCLA 38.121; MSA 15.2021. Either party may seek judicial review of the Commission's decision.

[5] 57 Mich App 636; — NW2d (1975).

be disciplined without a prior hearing, and we reverse the circuit court and the Court of Appeals.

I

The Crestwood Education Association (the union) and the Board of Education of the School District of Crestwood (the school board) have been involved in a prolonged labor dispute. There has been no collective bargaining agreement since August, 1973.

When the school year commenced on September 3, 1974, the teachers, members of the union, did not report for work. This action was brought against the union and the school board on September 30, 1974, by the plaintiffs as homeowners, taxpayers and parents. By subsequent stipulation, the plaintiffs were dismissed and the litigation has continued on the cross-complaint of the school board.

Injunctive orders were issued in October and classes resumed. In December the teachers again did not report for work and classes were suspended. Contempt proceedings followed. Thereafter the school board adopted a resolution requiring the teachers either to report for work or to submit a letter of resignation by December 27, 1974, failing which their employment would be terminated. Thirty-eight teachers reported for work, one submitted a letter of resignation and the remaining 184 were, by school board resolution of December 30, 1974, deemed to have terminated their employment.

The school board hired substitute teachers and attempted to operate the schools.

The union had therefore filed unfair labor practice charges with the Michigan Employment Relations Commission (MERC). The union then filed an amended charge

complaining that the school board had not bargained in good faith and was attempting to destroy and interfere with the union. The teachers sought individual Section 6 hearings on January 6, 1975. On January 10th the circuit court set aside the school board's resolution of December 30, 1974 and directed reinstatement of the teachers and the resumption of classes. The Court of Appeals affirmed. The teachers returned to work.

II

The PERA defines "strike", prohibits strikes by public employees,[7] and interdicts any public employer from authorizing a strike.[8]

Section 6 of the PERA empowers the officer or body generally having disciplinary authority over an employee to terminate the employment of or impose other discipline

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[6] "As used in this act: (a) 'strike' means the concerted failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges or obligations of employment." MCLA 423.201; MSA 17.455(1).

[7] "No person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a 'public employee,' shall strike." MCLA 423.202; MSA 17.455(2).

[8] "No person exercising any authority, supervision or direction over any public employee shall have the power to authorize, approve or consent to a strike by public employees, and such person shall not authorize, approve or consent to such strike, nor shall any such person discharge or cause any public employee to be discharged or separated from his or her employment because of participation in the submission of a grievance in accordance with the provisions of section 7." MCLA 423.203; MSA 17.455(3).

on an employee who strikes in violation of the PERA. In providing that an employee's request for a hearing to determine whether he did violate the PERA be filed within ten days *after* regular compensation has ceased or other discipline has been imposed, the Legislature manifested an intention that the officer or body may impose discipline without a prior hearing.

Section 6 begins with the words "[n]otwithstanding the provisions of any other law".

The Legislature, recognizing the diversity of legislation concerning public employees, provided in Section 6, a specific, unitary procedure for the discipline of public employees who strike superseding the diverse procedures applicable to different public employees where the basis for discipline is a ground other than striking.

Section 6 further provides that the proceeding for the determination whether the public employee violated the provisions of the PERA shall be "appropriate" to a proceeding for the removal of the employee (fn3), and, thus, in the case of a tenured teacher, consonant with the tenor of the procedures spelled out in the teachers' tenure act. But to the extent there is conflict—and manifestly there is conflict as the teachers' tenure act provides that discipline may be imposed only after charges, notice, hearing and determination, while the PERA contemplates imposition of discipline before a determination of whether the act has been violated and provides for a hearing only on request of the employee after the imposition of discipline—the PERA is to govern "[n]otwithstanding the provisions of any other law".

In enacting the PERA, the Legislature did not, apart from the "[n]otwithstanding the provisions of any other law" clause of Section 6, specifically provide that the

PERA supersedes or replaces existing laws which arguably also govern public employee labor relations. The union contends that the quoted clause modifies only the first sentence of Section 6.

This Court has consistently construed the PERA as the dominant law regulating public employee labor relations. In *Detroit Police Officers Association* v *Detroit,* 391 Mich 44; 214 NW2d 803 (1974), we held that residency and retirement benefits are mandatory subjects of collective bargaining under the PERA, although provisions of a city's ordinance and charter, promulgated under the Home Rule Act,[9] would otherwise govern. Earlier, in *Regents of the University of Michigan v Employment Relations Commission,* 389 Mich 96; 204 NW2d 218 (1973), this Court "harmonized" the constitutional authority of the Regents to supervise the university[10] and the authority of the Legislature to provide for the resolution of public employee disputes,[11] holding that interns and residents in the University of Michigan Hospital were entitled to engage in collective bargaining. In *Wayne County Civil Service Commission v Board of Supervisors,* 384 Mich 363, 374; 184 NW2d 201 (1971), this Court held that the original authority and duty of the Wayne County Civil Service Commission "was diminished *pro tanto*" by the PERA "to the extent of free administration of the latter".

The analysis is the same whether we label this reconciliation repeal by expression or by implication, *pro tanto* diminishing or harmonizing. The supremacy of the provisions of the PERA is predicated on the Constitution (Const

[9] Const 1963, art 7, §22; MCLA 117.1 *et seq.*; MSA 5.2071 *et seq.*

[10] Const 1963, art 8, § 5.

[11] Const 1963, art 4, § 48.

1963, Art 4, §48) and the apparent legislature intent that the PERA be the governing law for public employee labor relations.

The Teachers' Tenure Act was not intended, either in contemplation or design, to cover labor disputes between school boards and their employees. The 1937 Legislature in enacting the Teachers' Tenure Act could not have anticipated collective bargaining or meant to provide for the resolution of labor relations disputes in public employment. This Court's observation in *Wayne County Civil Service Commission, supra,* is pertinent: "In [no] instance could collective bargaining by public employees have been in the minds of the people, or of the [1937] legislators. The thought of strikes by public employees was unheard of. The right of collective bargaining, applicable at the time to private employment, was then in comparative infancy and portended no suggestion that it eventually might enter the realm of *public* employment." (Emphasis by the Court.)

The State Tenure Commission has no authority to entertain an unfair labor practice charge against a school board. It jurisdiction and administrative expertise is limited to questions traditionally arising under the Teachers' Tenure Act.

MERC alone has jurisdiction and administrative expertise to entertain and reconcile competing allegations of unfair labor practices and misconduct under the PERA.

There is no provision in the Teachers' Tenure Act analogous to §16 (h) of the PERA (see Part VI, *infra*) *providing* for temporary relief by a circuit court pending consideration of an unfair labor practice charge. The circuit court's jurisdiction under the Teachers' Tenure Act does not arise until appeal from a decision of the State Tenure Commission.

All teachers do not have rights of continuing tenure. Yet both tenured and non-tenured teachers are in a single public employee bargaining unit and have the same rights and obligations under Michigan's labor relations statutes.[12]

A construction of the statutes providing uniform treatment of all public employee labor relations questions is more likely to effect a sound and expeditious resolution of labor disputes. Requiring hearings under both the Teachers' Tenure Act and the Michigan labor relations statutes, with review of the former by the circuit court and of the latter by the Court of Appeals, could result in competing claims and conflicting adjudications with untoward and costly delay.

Public employees may be disciplined under Section 6 of the PERA only for engaging in *concerted* strike action,[13] while most disciplinary actions subject to the jurisdiction of the State Tenure Commission concern individual teachers. It should therefore be a rare case where the line separating disputes subject to the jurisdiction of the State Tenure Commission from those subject to the jurisdiction of the MERC will be unclear.

The Crestwood teachers have asserted that they justifiably withheld their services because they had not been able to negotiate a new labor contract since August, 1973. No claim is or could be made that the discharges were occasioned by any cause other than the labor dispute.

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[12] *Paw Paw Board of Education v Paw Paw Education Association*, 1973 MERC 668; *Summerfield School Dist v Summerfield Education Association*, 1969 MERC 439.

[13] The present definition of strike as "concerted" activity represents a change from the Hutchinson Act under which a *single* employee, acting alone, could strike. *See* Howlett, *Michigan's New Public Employment Relations Act*, 45 Mich St B J 12, 14 (April, 1966).

Excluding from the jurisdiction of the State Tenure Commission discharges for concerted strike action will not impede the goals sought to be achieved by enactment of the Teachers' Tenure Act. These goals, as set forth in *Rehberg v Ecorse School Dist No 11*, 330 Mich 541, 545; 48 NW2d 142 (1951), quoting cases from foreign jurisdictions, are to "maintain an adequate and competent teaching staff, free from political and personal arbitrary interference"; to promote "good order and the welfare of the State and of the school system by preventing removal of capable and experienced teachers at the personal whims of changing office holders"; and "to protect and improve State education by retaining in their positions teachers who are qualified and capable and who have demonstrated their fitness, and to prevent the dismissal of such teachers without just cause".[14]

This construction of the two acts will not enable MERC to circumvent, at the request of school boards, the protection provided tenured teachers by the Teachers' Tenure Act. If the school board claims that a teacher was discharged for striking, the appeal is to the circuit court, not to MERC. If the school board claims that the teacher was discharged for a reason other than striking, MERC's jurisdiction is invoked only if the teacher claims he was discharged for activity protected under the PERA and the teacher himself files an unfair labor practice charge with the MERC; such a charge would not preclude the teacher

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[14] Apart from the field of labor relations, the right of tenured teachers to a hearing has not been thought to require a prior hearing in every case. The Teachers' Tenure Commission has held, and the Court of Appeals affirmed, that the notice and hearing provisions in the Teachers' Tenure Act do not apply "in cases of reduction of personnel due to economic reasons. *Steeby v School Dist of Highland Park*, 56 Mich App 395, 396; 224 NW2d 97 (1974).

from also defending against the discharge at a Teachers' Tenure Act hearing on the ground that it was not supported by reasonable and just cause.

III

Whether a teacher's employment can be terminated, consistent with the Due Process Clause, without a hearing need not be decided. The PERA provides for a hearing.

The claim that the Due Process Clause requires a *prior* hearing in every case of deprivation of a property right has been rejected by the United States Supreme Court.[15]

When the government seeks to deprive a person of a property right—and we accept, *arguendo,* that a teacher's statutory rights under the Teachers' Tenure Act constitute property—due process requires a "hearing appropriate to the nature of the case." *Mullane v Central Hanover Bank & Trust Co,* 339 US 306, 313; 70 S Ct 652; 94 L Ed 865 (1950). "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v Connecticut,* 401 US 371, 378; 91 S Ct 780; 28 L Ed 2d 113 (1970). "The types of 'liberty' and 'property' protected by the Due Process Clause vary wide-

[15] *See, e.g., Arnett v Kennedy,* 416 US 134; 94 S Ct 1633; 20 L Ed 2d 15 (1974); *Mitchell v W T Grant Co,* 416 US 600; 94 S Ct 1895; 40 L Ed 2d 406 (1974); *North American Cold Storage Co v Chicago,* 211 US 306; 29 S Ct 101; 53 L Ed 195 (1908); *Central Union Trust Co v Garvan,* 254 US 554; 41 S Ct 214; 65 L Ed 403 (1921); *Corn Exchange Bank v Coler,* 280 US 218; 50 S Ct 94; 74 L Ed 378 (1930); *Phillips v Commissioner,* 283 589; 51 S Ct 608; 75 L Ed 1289 (1931); *Bowles v Willingham,* 321 US 503; 64 S Ct 641; 88 L Ed 892 (1944); *Fahey v Mallonee,* 332 US 245; 67 S Ct 1552; 91 L Ed 2030 (1947); *Ewing v Mytinger & Casselberry, Inc,* 339 US 594; 70 S Ct 870; 94 L Ed 1088 (1950).

ly, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." *Arnett v Kennedy,* 416 US 134, 155; 94 S Ct 1633; 40 L Ed 2d 15, 34 (1974). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v McElroy,* 367 US 880, 895, 81 S Ct 1743; 6 L Ed 2d 1230 (1961).

In its most recent expression on the subject, the Supreme Court in *Arnett v Kennedy, supra,* rejected a due process challenge to a statute allowing the discharge of a Federal employee without a pre-disciplinary evidentiary hearing. A variety of rationales were espoused, but the uniform thrust of each opinion, including the dissents, is that the constitutional necessity of a pre-disciplinary hearing must be determined by balancing the competing interests of the government and employee.

"We have repeatedly observed that due process requires that a hearing be held 'at a meaningful time and in a meaningful manner,' *Armstrong v Manzo,* 380 US 545, 552 (1965), but it remains for us to give content to that general principle in this case by balancing the Government's asserted interests against those of the discharged employee." *Arnett v Kennedy, supra,* 416 US 134, 212 (Marshall, J., dissenting with Brennan and Douglas, JJ.).

When public employees strike, the public employer must, like a private employer, be able to hire substitute employees so that the public business is not interrupted. In order to hire competent replacements, it may be necessary for the public employer to offer permanent employment and thus displace strikers. Where essential services have been suspended, the hiring of replacements often cannot await time-consuming adjudicatory processes.

The predominant interest secured by pre-disciplinary hearings, as advanced in *Arnett, supra,* is protection against removal of the wrong person and, assuming ultimate employee vindication, protection against interim financial deprivation.

The possibility of removal of a non-striker is minimized when, as here, the school board gives each striker teacher personal notice of the opportunity to return to the classroom before disciplinary action is taken. While on strike, a teacher receives no compensation; striking teachers do not suffer additional interim financial deprivation when disciplined.

IV

The union contends, and we agree, that by striking, the teachers did not cease to be employees.[16] Their employment could only be terminated in accordance with the procedures set forth in Section 6 of the PERA.

The Michigan labor relations acts are modeled on the National Labor Relations Act (NLRA).[17] In the private sector, the use of economic pressure by the parties to a labor dispute "is part and parcel of the process of collec-

[16] *See School Dist for the City of Holland v Holland Education Association,* 380 Mich 314; 157 NW2d 206 (1968). If the employment relationship is severed when an employee strikes, arguably there would be no governing law. The PERA, in terms, governs only relationships between public employers and their public employees.

Under the NLRA, a striking employee remains an "employee" for purposes of the act and remains protected against unfair labor practices. *NLRB v MacKay Radio & Telegraph Co,* 304 US 333, 345; 58 S Ct 904; 82 L Ed 1381, 1390 (1938).

[17] 61 Stat 136 (1947) *et seq.*, 29 USCA 151 *et seq.*

tive bargaining." *NLRB v Insurance Agents International Union,* 361 US 477, 495; 80 S Ct 419; 4 LEd 2d 454 (1960). Under the NLRA and the Michigan labor mediation act, the term "employee" includes an employee on strike. Both acts define "employee" as including:

> "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of [under the NLRA, "any unfair labor practice"/under the labor mediation act, "any act which is illegal hereunder"], and who has not obtained any other regualr and substantially equivalent employment."[18]

In construing the Michigan labor mediation act and the PERA, this Court has frequently been guided by the construction placed on the analogous provisions of the NLRA by the NLRB and the federal courts.[19]

The NLRB and the federal courts have developed an intricate body of law concerning the reinstatement of strikers. There are many permutations, but certain general principles have emerged. The Federal cases recognize an employer's right to hire replacements for strikers.[20] "Eco-

[18] MCLA 423.2; MSA 17.454(2); 61 Stat 137 (1947), 29 USCA 152.

[19] *See Detroit Police Officers Association v Detroit,* 391 Mich 44; 214 NW2d 803 (1974); *Michigan Employment Relations Commission v Detroit Symphony Orchestra, Inc,* 393 Mich 116, 127; 223 NW2d 283 (1974); *Michigan Employment Relations Commission v Reeths-Puffer School Dist,* 391 Mich 253, 260; 215 NW2d 672 (1974).

[20] Although § 13 provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers." *NLRB v McKay Radio & Telegraph Co, supra,* at p 345, Note, *Replacement of Workers During Strikes,* 75 Yale L J 630 (1966).

nomic strikers" have limited rights of reinstatement.[21] "Unfair labor practice" strikers have an absolute right to reinstatement—unless guilty of misconduct[22]—even if the employer has hired permanent replacements.

Although a strike begins as an economic strike, if it is determined that the employer engaged in an unfair labor practice, the strike may be held to be an unfair labor practice strike and the striking employees entitled to reinstatement.[23]

Since an economic strike is protected concerted activity under the NLRA and the Michigan labor mediation act, it is an unfair labor practice for a private employer to discharge an employee for engaging in an economic strike before the employee has been replaced.[24] The Crestwood school board discharged the school teachers before hiring replacements. However, in contrast with the NLRA and

[21] An economic striker may be entitled to re-employment when the strike ends if his job has not been filled by a permanent replacement. Even when the job has been filled, if a vacancy subsequently occurs economic strikers who have indicated their continued availability have a qualified right to re-employment. *See* Morris, *The Developing Labor Law* (1971), pp 524-529; Note, *Replacement of Workers During Strikes, supra.*

[22] *See* 45 ALR2d 887 Anno: *National Labor Relations Act: Sitdown strike, violence, or similar misconduct during strike as affecting employer's right to discharge employee or employee's right to be reinstated after strike.*

[23] *See NLRB v International Van Lines,* 409 US 48, 52; 93 S Ct 74; 34 L Ed 201 (1972); *Local 833, UAW-AFL-CIO,* etc NLRB, 112 US App DC 197, 109; 300 F2d 699, 701 (CA DC, 1962); *NLRB v Guistina Bros Lumber Co,* 253 F2d 371, 373 (CA 9, 1958); *NLRB v Reliance Clay Products Co,* 245 F2d 599 (CA 5, 1957); *NLRB v Waukesha Lime & Stone Co, Inc,* 343 F2d 504, 510 (CA 7, 1965).

[24] *See NLRB v International Van Lines, supra.* "[T]he authorities uniformly hold that the discharge of economic strikers prior, as here, to the time their places are filled constitutes an unfair labor practice." *NLRB v Globe Wireless,* 193 F2d 748, 750 (CA 9, 1951).

the Michigan labor mediation act, the PERA prohibits strikes in public employment; public employee strikes, therefore, are not protected "lawful concerted [activity] for the purpose of collective negotiation or bargaining or other mutual aid and protection" within the meaning of Section 9 of the PERA,[25] modeled on Section 8 of the Michigan labor mediation act[26] and Section 7 of the National Labor Relations Act.[27]

The federal courts have held that a strike may be unlawful either because it has an unlawful purpose or unlawful means are used to accomplish a lawful purpose and strikers who engage in unlawful strike activity may be discharged.[28]

The action of the Crestwood school board is discharging teachers for striking in violation of the provisions of the PERA prior to the hiring of replacements was not violative of that act. It does not necessarily follow, however, that these teachers may not be entitled to reinstatement should MERC determine that the school board engaged in an unfair labor practice.

[25] MCLA 423.209; MSA 17.455(9).

[26] MCLA 423.8; MSA 17.454(8).

[27] 61 Stat 140 (1947), 29 USCA 157.

[28] Resort to violence and the so-called sit-down strike are unlawful means. Jurisdictional strikes and a strike whose aim is featherbedding are strikes for unlawful purposes under the NLRA. *See generally,* Morris, *The Developing Labor Law* (1971), pp 529-535.

V

The union filed an unfair labor practice charge with the MERC which has not been considered on its merits. Its amended charge, filed after the December 30, 1974 discharge of the teachers, asserts that "[a]ny interruptions in the performance of teaching duties by teachers in such district have been directly provoked and instigated by the unfair labor practices of respondent employer."

If MERC should determine that the employing school district committed an unfair labor practice, MERC *may,* despite the illegality of the teachers' strike, order reinstatement.

The distinction between administrative agencies and equity courts in the application of the "clean hands" doctrine was early recognized by the NLRB and the federal courts in implementing the Congressional mandate that upon the finding of an unfair labor practice the Board "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the [NLRA]."[29] "Equally untenable is the contention that the strikers are not entitled to reinstatement because they have not come into court with clean hands. This principle is not applicable to a proceeding in which a governmental agency is seeking enforcement of its order in the public interest." *Republic Steel Corp v NLRB,* 107 F2d 472, 479 (CA 3, 1939) *modified on other grounds,* 311 US 7; 61 S Ct 77; 85 L Ed 6 (1940)[30]

[29] NLRA § 10(c), 61 Stat 147 (1947), 29 USCA 160(c).

[30] *See* Chafee, *Coming Into Equity with Clean Hands,* 47 Mich L Rev 1065, 1080-1081 (1949).

The languague of the Michigan labor mediation act spelling out the remedial authority of the MERC upon finding an unfair labor practice is identical to the corresponding language of the NLRA.[31]

If the MERC finds that an unfair labor practice or other misconduct was committed by both sides, it should balance the competing equities to reach a result best effectuating the goals of the act.

> "Where an employer who has committed unfair labor practices discharges employees for unprotected acts of misconduct, the Board must consider both the seriousness of the employer's unlawful acts and the seriousness of the employees' misconduct in determining whether reinstatement would effectuate the policies of the Act. Those policies inevitably come into conflict when both labor and management are at fault. To hold that employee 'misconduct' automatically precludes compulsory reinstatement ignores two considerations which we think important. First, the employer's antecedent unfair labor practices may have been so blatant that they provoked employees to resort to unprotected action. Second, reinstatement is the only sanction which prevents an employer from benefiting from his unfair labor practices through discharges which may weaken or destroy a union." *Local 833, UAW-AFL-CIO, etc v NLRB,* 112 US App DC 107, 110-111; 300 F2d 699, 702-703 (1962). Upon remand *Kohler Co,* 148 NLRB 1434 (1964); *aff'd* 120 US App DC 259; 345 F2d 748 (1965); *cert den* 382 US 836; 86 S Ct 82; 15 L Ed 2d 79 (1965).

[31] "[T]o take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act." MCLA 423.216(b); MSA 17.455(16)(b).

In this case, teachers sought review under Section 6. Because of the pendency of this litigation, Section 6 hearings have not been conducted. The hearings may now proceed or, if the parties agree, be deferred until determination by MERC of the unfair labor practices charges.

A Section 6 hearing is of limited inquiry. Its sole purpose is to determine whether the employer correctly identified the particular employee as a violator of the act's prohibition against striking. Since the hearing will ordinarily be conducted by the employer, as the officer or body having general disciplinary authority, a Section 6 hearing is not an appropriate forum for the employee to assert in defense the employer's violation of the act. Allegations of or defenses premises upon employer misconduct are the exclusive province of the MERC to resolve upon the filing of an unfair labor practice charge.

Even if it should be determined in Section 6 hearings that particular teachers have violated the provisions of the PERA by striking and those determinations are sustained on review, if MERC orders reinstatement of striking teachers because it determines that this affirmative action will best "effectuate the policies of the act" and that determination is sustained on review, the teachers shall be reinstated.[32]

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[32] To determine whether employee misconduct will bar reinstatement, the NLRB and the United States Courts of Appeals consider the gravity of the misconduct in light of the employer's unfair labor practices and discriminatory discharges. Note, *Strike Misconduct as Grounds for Denial of Reinstatement*, 32 NYU Rev-839, 843 (1957); Sahm, *Picket-Line Misconduct and Employee Reinstatement*, 56 ABA J 561 (1970); Lipton, *Misconduct in Concerted Activities Under the NLRA*, 8 Labor L J 299 (1957).

In the following cases reinstatement was ordered: *NLRB v Thayer Co*, 213 F2d 748 (CA 1, 1954), *cert den* 348 US 883; 75 S Ct 123; 99

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VI

The status of the teachers presently in the classrooms pending resolution by MERC of the unfair labor practice charges is of considerable importance to the school children, parents, and school board, as well as to the teachers.

The teachers were reinstated pursuant to the Court of Appeals order of January 17, 1975. In granting leave we did not stay that aspect of that order.

Section 16(h) of the PERA[33] provides that MERC shall have the power, upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair labor practice, to petition the circuit court for "appropri-

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L Ed 694 (1954) (improper strike; discriminatory discharge); *NLRB v Thor Power Tool Co*, 351 F2d 584 (CA 7, 1965) (abusive language; discriminatory discharge); *Allied Industrial Workers, AFL-CIO Local Union No. 289 v NLRB*, 155 US App DC 112; 476 F2d 868 (1973) (following a car to coerce and harass the occupants not to report to work; employer unfair labr practice); *NLRB v Wallick*, 198 F2d 477 (CA 3, 1952) (unreported strike; employer unfair labor practice); *NLRB v Wichita Television Corp*, 277 F2d 579 (CA 10, 1960) (mass picketing, blocking doorway, heckling; discriminatory discharge); *NLRB v Elkland Leather Co*, 114 F2d 221 (CA 3, 1940) (throwing stones at cars of "loyal" employees; employer unfair labor practice).

In the following cases reinstatement was denied: *Seminole Asphalt Refining, Inc v NLRB*, 497 F2d 247 (CA 5, 1974) (throwing cherry bombs into company property near storage tanks containing flammable petroleum; employer unfair labr practice); *NLRB v Big Three Welding Equipment Co*, 359 F2d 77 (CA 5, 1966) (pilfering company's property; discriminatory discharge); *NLRB v R C Can Co*, 340 F2d 433 (CA 5, 1965) (threat of physical violence discriminatory discharge); *Iowa Beef Packers, Inc v NLRB*, 331 F2d 176 (CA 8, 1964) (giving false testimony at hearing on unfair labor practice charge; unfair labor practice); *NLRB v Longview Furniture Co*, 206 F2d 274 (CA 4, 1953) (profanity, insults and striking of employee who attempted to continue working; employer unfair labor practice).

[33] MCLA 423.216; MSA 17.455(16).

ate temporary relief or restraining order" and that the circuit court shall have jurisdiction to grant "to the board [MERC]" such temporary relief or restraining order as it deems just and proper.[34]

When the union filed with MERC the amended unfair labor practice charge against the school board on January 6, 1975, it requested the Commission to seek immediate relief in the circuit court pursuant to Section 16(h). The director of the MERC responded the same day: "It has been the consistent policy of this Commission to refrain from petitioning for temporary relief or a restraining order under the provisions of Section 16(h) of the act. Therefore, your request is denied and the charges filed in the matter will be processed in accordance with established statutory procedures."

Whatever the reasons for this policy—financial or personnel limitations or other—the Commission may not properly adopt an arbitrary policy of refusing to consider exercising, without regard to the circumstances, power conferred upon it by the PERA.

The Commission should consider and decide the union's request. If the Commission persists in its refusal to act on the request, it would appear that an order should enter directing it to do so.[35]

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[34] The same provision is to be found in § 23(i) of the labor mediation act. MCLA 423.23; MSA 17.454(25).

[35] Our view that MERC should exercise its discretion regarding the teacher's request in no way portends judicial review of MERC's discretion. *See* Anno: *Availability of Independent Suit in Federal District Court to Attack Action Taken or Order Issued by National Labor Relations Board*, 2 ALR F 376, 399-400, § 6(c); Morris, *The Developing Labor Law*, 873-878. We simply hold that an administrative agency empowered to exercise discretion abuses its discretion and errs as a matter of law when it absolutely refuses in every and any instance to exercise its discretion.

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VII

The Court of Appeals ordered the school board and the union to submit this dispute to compulsory arbitration.

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MERC's power under § 16(h) of the PERA to seek an injunction in circuit court is identical to the NLRB's discretionary power under § 10(j) of the NLRB to seek such relief in Federal district court. For discussions of § 10(j)'s legislative history and its implementation by the NLRB and Federal courts see, Seigel, *Section 10(j) of the National Labor Relations Acts Suggested Reforms for an Expanded Use*, 13 Boston Col Ind & Comm L Rev 457 (1972); Note, *Temporary Injunctions under Section 10 (j) of the Taft-Hartley Act*, 44 NYU L Rev 181 (1969).

The NLRB Field Manual lists guidelines used by the NLRB in considering whether to seek § 10 (j) relief:

1. The clarity of the alleged violations:

2. Whether the case involves the shutdown of important business operations which, because of their special nature, would have an extraordinary impact on the public interest;

3. Whether the alleged unfair labor practices involve an unusually wide geographic area, thus creating special problems of public concern;

4. Whether the unfair labor practices create special remedy problems so that it would probably be impossible either to restore the status quo or effectively dissipate the consequences of the unfair labor practices through resort to the regular procedures provided in the Act fr NLRB order and subsequent enforcement proceedings;

5. Whether the unfair labor practices involve interference with the conduct of an election or constitute a clear and flagrant disregard of NLRB certification of a bargaining representative or other NLRB procedures;

6. Whether the continuation of the alleged unfair labor practices will result in exceptional hardship to the charging party;

7. Whether the current unfair labor practice is of a continuing or repetitious pattern;

8. Whether, if violence is involved, the violence is of such a nature as to be out of control of local authorities or otherwise widespread and susceptible of control by § 10(j) relief.

NLRB Field Manual, §10310.2 (reprinted in 48 Am Jur, Labor and Labor Relations §1016 [1974 supp], p 127).

The union defends this directive on the ground that, having sought equity, the school board may appropriately be required to do equity. It is asserted that a court of equity has the power to grant "complete relief", to "order done what ought to be done," and to enter such orders as may be in the "public interest" and as "appeal to the conscience of the chancellor" so as to provide a remedy consonant with its directive that the teachers "work under conditions they had never agreed to and which remain patently obsolete in a period of mounting inflation. The court refused to impose continued 'involuntary servitude' without providing a rational means of resolving the impasse between two stubborn parties."

The Court of Appeals order was predicated on its court-rule conferred power to "[g]ive any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief as the case may require",[36] and its statutory power "to issue any writs, directives and mandates that it judges necessary and expedient to effectuate its determination of cases brought before it."[37]

The union relies on cases where special masters, receivers or monitors were appointed. But in every such case, the person so appointed was authorized to exercise a power which the judge, if not otherwise preoccupied, could himself exercise. A special master, receiver or monitor exercises the powers conferred upon him subject to the judge's power to substitute his own independent judgment at any time for the judgment of the special master, receiver or monitor unimpeded by the limitations generally pertain-

[36] GCR 1963, 820.1(7).

[37] MCLA 600.310; MSA 27A.310.

ing when a court sits in judicial review of an arbitartor's decision.

If the compulsory arbitration ordered by the Court of Appeals contemplated the kind of supervision a judge exercises over a special master, receiver or monitor or the kind of plenary equitable power a chancellor possesses, then, in the final analysis, the court itself would be called upon to decided the contract terms, to write a contract for the parties. If it was contemplated that the court would sit in judicial review of the compulsory arbitartor's decision, then the special master-receiver-monitor analogy is inapposite.

While the PERA obliges a public employer to bargain collectively with the representatives of its employees, it is further provided that "such obligation does not compel either party to agree to a proposal or require the making of a concession".[38]

The Constitution provides that it is the Legislature, not the judiciary, that has the power to "enact laws providing for the resolution of disputes concerning public employees."[39] The Legislature has chosen to provide for the resolution of impasses in collective bargaining only in the case of municipal police and fire department.[40] Apart from that enactment, there is no statute for the resolution of impasses in either public or private collective bargaining.

A court is without power to make a contract for parties or to confer on someone else the power to make a contract for them. By like token, it cannot compel the parties to confer on someone else the power to make a contract.

[38] MCLA 423.215; MSA 17.455(15).

[39] Const 1963, art 4, § 48.

[40] 1969 PA 312; MCLA 423.231 *et seq.*; MSA 17.455 (31) *et seq.*

A court, in law or equity, may indeed enter all appropriate orders, but only those consistent with the proper discharge of its judicial responsibility. It has been said that there is not a judicial remedy for every wrong or shortcoming in society or in a statutory scheme. The Legislature has left the resolution of collective bargaining impasses in limbo and there the matter shall remain until it chooses to act.

Reversed. No costs, a public question.

T. G. KAVANAGH, C.J. and M. S. COLEMAN and J. W. FITZGERALD, JJ., concurred with LEVIN, J.

Before the entire bench.

WILLIAMS, J. *(for affirmance except as to compulsory arbitration.*

We decide today a significant matter of state-wide importance involving the respective rights and duties of school teachers and a school board engaging in a labor dispute characterized by the teachers' withholding their serivces and allegations of unfair labor practices on the part of the school board. In resolving the questions presented, the Crestwood school situation places this Court once again in its historic role of preserving traditional rights and fundamental values of the past while accommodating newer rights and requirements dictated by the necessities of the present and the future.

The ultimate and publicly understood issue in this case is—can the school board discharge allegedly unlawfully[1] striking teachers without prior notice and hearing?

[1] The Michigan Employment Relations Commission [hereafter "MERC"] has yet to decide whether or not the school board was guilty of an unfair labor practice thereby "provoking" the withholding of services.

This ultimate issue, however, totally depends upon a threshold issue. The threshold and dispositive issue is narrow and technical—to what extent has the public employment relations act[2] [hereafter "PERA"] repealed the Teachers' Tenure Act,[3] [hereafter "TTA"] by implication, because TTA would clearly provide prior notice and hearing in this case.

The narrow, technical issue in turn depends upon whether the alleged repealing legislation, PERA, contains a discharge provision in conflict with the clear and detailed discharge provisions in TTA so that it can be said that the conflicting PERA provision repeals the TTA provisions by implication because PERA is subsequent legislation.

To begin with then, the *dispositive issue* in this case is—*is there a discharge provision in PERA that conflicts with and repeals the discharge provisions in TTA?*

The fact of the matter is that there is not a single word in PERA affirmatively providing for a discharge procedure. On the contrary, there is a PERA provision that refers outside of PERA to a separate discharge procedure clearly indicating that there is none in PERA.[4] As consequence, it is neither legally nor logically appropriate to say that there is a discharge provision in PERA that conflicts with, and hence repeals by implication, the discharge provisions of TTA.

[2] MCLA 423.201 *et seq.*; MSA 17.455(1) *et seq.*

[3] MCLA 38.101 *et seq.*, MSA 15.2001, *et seq.*

[4] "In the event of such request [for a determination whether or not there was a violation of the PERA anti-strike provision] the officer or body shall within 10 days commence a proceedings for the determination of whether the provisions of this act have been violated by the public employee, *in accordance with the law and regulations appropriate to a proceeding to remove the public employee.*" (Emphasis added.) MCLA 423.206; MSA 17.455(6).

The school board and Justice LEVIN's opinion, however, attempt to *infer* a conflicting discharge provision in PERA, since they cannot refer to any provision which in so many words sets up a discharge provision, for the simple reason that, in fact, there isn't any. It is submitted that it is legally unacceptable to construe repeal of a well-established statutory provision by a mere inference in a subsequent statute, especially when the meaning of that inference is dubious at the best.

As to the dispositive issue, bearing in mind this Court's duty to reasonably and harmoniously construe legislation bearing on the same subject matter, and bearing in mind as well our duty to protect basic rights once granted by legislation or otherwise, it is our opinion that there is no PERA discharge provision that conflicts with, and hence repeals by implication, the traditional rights of notice and hearing prior to discharge which are at the heart of TTA. As a consequence, we affirm the Circuit Court order of January 10, 1975, and the Court of Appeals result minus "compulsory" arbitration.

I—*Facts*

Our Brother LEVIN cogently recites the factual background in this case in Section I of his opinion. It is worth noting, in addition to that recitation, that the circuit court based its order of January 10, 1975, setting aside the Board's discharge resolution of December 30, 1974, and reinstating the teachers, on the failure of the board to follow the procedural requirements of TTA, which a majority of that Court, Judges Bowles and Roumell,[5] found to be controlling in this situation. The Court of Appeals, while unanimous in its affirmation of the circuit court order and finding of procedural infirmity, based on its decision not on TTA alone but rather on a blend of the requirements of TTA and PERA, §6,[6] the latter, the Court holding, being controlling in the two "irreconciliable" instances of conflict which it found.

II—*Pertinent Statutory Provisions*

The critical statutory provisions of TTA and PERA read as follows:

TTA

> "The controlling board, if it decides to proceed upon * * * charges, [against a teacher] shall furnish the teacher with a written statement of the charges including a statement of the teacher's rights under this article, and shall, at the option of the teacher, provide for a hearing to take place not less than 30 nor more than 45 days after the filing of such charges." MCLA 38.102; MSA 15.2002.
>
> "Any hearing held for the dismissal or demotion of a teacher, as provided in this act, must be concluded by a decision in writing, within 15 days after

[5] It is significant to note that both Judge Bowles and Judge Roumell have had distinguished backgrounds in labor law. Judge Roumell has previously served as Director of the Michigan office of the NLRB, as Director of the Michigan Employment Security Commission, and as the first Director of the Michigan Department of Labor. Judge Bowles, in addition to a distinguished career as a labor arbitrator in private practice, served as Chairman of a Labor Mediation Board in another state, and as Chairman of the NLRB Detroit field division.

[6] MCLA 423.206; MSA 17.455(6).

the termination of the hearing. A copy of such decision shall be furnished the teacer affected within 5 days after the decision is rendered." MCLA 38.104(f); MSA 15.2004(f).

"A teacher who has achieved tenure status may appeal any decision of a controlling board under this act within 30 days from the date of such decision, to a state tenure commission." MCLA 38.121; MSA 15.-2021.

PERA §6

"Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superiors, willfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights, privileges or obligations of employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing, with the officer or body having power to remove or discipline such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. In the event of such request the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be undertaken without unnecesary delay. The decision of the proceeding shall be made within 10 days. If the

employee involved is held to have violated this law and his employment terminated or other discipline imposed, he shall have the right of review to the circuit court having jurisdiction of the parties, within 30 days from such decision, for determination whether such decision is supported by competent, material and substantial evidence on the whole record".

III—*Applicable Rules of Statutory Construction*

General comparison of the pertinent sections of TTA and PERA above indicates that they are statutes *in pari materia*. It is therefore our duty to harmonize them if we can:

> "[I]f the courts can by any fair, strict or liberal construction find for the two provisions a reasonable field of operation, without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation upon the subject it is their duty to do so." *Rathbun* v *State of Michigan,* 284 Mich 521, 544-545; 280 NW 284 (1938), quoting with approval from *State ex rel Ellis v Givens,* 48 Fla 165, 174; 37 So 308 (1904).

See also *Borden, Inc v Department of Treasury,* 391 Mich 495, 511, 523; 218 NW2d 667 (1974) (Opinion of WILLIAMS, J.).

Additionally, insofar as TTA and PERA cannot be reconciled and one act is in conflict with the other, PERA as the later legislation will be deemed to supersede TTA *pro tanto*. The Court of Appeals properly cited the general

rule in this regard from *Wayne County Civil Service Commission v Board of Supervisors,* 384 Mich 363, 373; 184 NW2d 201 (1971):

> "This is not to say that the act of 1965 repeals outright the act of 1941. Respecting as always our long since declared and regularly maintained rule that repeals by implication are not favored, and that it is only when the two measures in view are so incompatible that both or all cannot fully stand, we can only find that this is a striking instance for application of that rule which, back in 1877, was written into the Court's opinion of *Breitung* v *Lindauer* (1877), 37 Mich 217, 233:
>
> "'The rule is that the latter act operates *to the extent of the repugnancy*, as a repeal of the first, or, if the two acts are not in express terms repugnant, yet if the latter *covers the whole subject of the first,* and contains new provisions showing that it was intended as a substitute, it will operate as a repeal.'" (Footnote omitted.)

Further, there is a voluminous case law standing for the proposition that a "repugnancy" pronounced enough as to work a repeal by implication "must be clear and unavoidable"[7] — if the allegedly conflicting statutes "can be reconciled and a purpose found to be served by each," then there is no conflict. *Detroit Police Officers Association v City of Detroit,* 391 Mich 44, 65; 214 NW2d 803 (1974). The guiding principles of construction in this contest are as follows:

[7] "[T]he repugnancy must be clear and unavoidable." *In re Lambrecht,* 137 Mich 405, 455; 100 NW 606 (1904).

> "'Repeal by implication is not permitted if it can be avoided by any reasonable construction of the statutes. *Couvelis v. Michigan Bell Telephone Co.,* 281 Mich 223;*People v. Hanrahan,* 75 Mich 611 (4 LRA 751). If by any reasonable construction 2 statutes can be reconciled, and a purpose found to be served by each, both must stand, *Garfield Township v. A. B. Klise Lumber Co.,* 219 Mich 31; *Edwards v. Auditor General,* 161 Mich 639; *People v. Harrison,* 194 Mich 363. The duty of the courts is to reconcile statutes if possible and to enforce them, *Board of Control of the Michigan State Prison v. Auditor General,* 197 Mich 377. The courts will regard all statutes on the same general subject as part of 1 system and later statutes should be construed as supplementary to those preceding them, *Wayne County v. Auditor General,* 250 Mich 227. See, also *Rathbun v. State of Michigan,* 284 Mich 521; *People v. Buckley,* 302 Mich 12, 22.
>
> "'This court has held that only, when 2 acts are so incompatible that both cannot stand, does a later act repeal a former' *In re Estate of Reynolds,* 274 Mich 354, 360." *Valentine v Redford Twp Supervisor,* 371 Mich 138, 144; 123 NW2d 227 (1963).

See also *In re Lambrecht,* 137 Mich 450, 455; 100 NW 606 (1904); *Garfield Twp v A. B. Klise Lumber Co,* 219 Mich 31, 35; 188 NW 459 (1922); *Saginaw City Council v Saginaw Board of Estimates,* 256 Mich 624, 633; 239 NW 872 (1932), and citations collected therein.

IV—*Does PERA Provide a Discharge Procedure in Conflict with TTA?*

TTA, as the statutory excerpts set out in Part II above indicate, provides a very specific discharge procedure including furnishing written charges along with a statement of the teacher's rights, a hearing no less than 30 nor more than 45 days after filing charges, and a decision in writing within 15 days of the conclusion of the hearing, which must be furnished the teacher within 5 days after it is rendered.

TTA is in effect "the teachers' Magna Charta.[8] The heart of it is this guarantee of due process in any discharge proceeding, especially prior notice and hearing.

It must be presumed therefore that if the Legislature should decide to repeal what it had so specifically granted it would not do so in an offhand manner but by specific repeal or repeal by implication clear beyond peradventure. As we said in *Rathbun v State of Michigan,* 284 Mich 521, 544; 280 NW 35 (1938), quoting 59 CJ, p 1051:

> "it will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, *unless it has done so in express terms* * * *." (Emphasis added.)

Without question, PERA provides no specific repeal of TTA discharge procedure. Does PERA repeal TTA's discharge procedure by implication by setting up a discharge procedure in direct, unavoidable conflict? The answer is that it does not.

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[8] *Cf. Shiffer v Board of Education of Gibraltar School Dist,* 393 Mich 190, 209-210; 224 NW2d 255 (1974) (Opinion of Williams, J.).

Nowhere in PERA in any discharge procedure set up. PERA does not specify that there must be notice and hearing before discharge. PERA does not specify that notice and hearing are not necessary before discharge. PERA § 6 does not provide in any way, shape, or fashion the mechanism or authority for a discharge or disciplinary proceeding.

What PERA does set up is a procedure in its own words to be "a determination as to whether he [the alleged striker] did violate the provisions of this act". The pertinent language is:

> "[the alleged striker] shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing within 10 days after regular compensation of such employee has ceased or other discipline has been imposed."

This hearing obviously is not a discharge or discipline hearing because it is only requested *after* discharge or discipline. In establishing the rules of conduct for such a determination, there is specific reference to a body of rules outside of PERA, which, in this case, Justice LEVIN's opinion agrees is TTA. The text here referred to is as follows:

> "In the event of such request [for a determination whether or not there was a violation of the PERA anti-strike provision] the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, *in accordance with the law and regulations appropriate to a proceeding to remove the public employee.*" (Emphasis added.)

In short, since PERA does not set up a discharge procedure itself and specifically refers outside of PERA for such a procedure, it cannot be said, following the rules of statutory construction set out in Part III of this opinion, that PERA by implication has repealed the discharge procedure in TTA.

As a matter of fact, not only is there no statutory repugnancy here, it is perfectly possible and reasonable to read these statutes together, *i.e.*, a PERA hearing shall occur only after there has been discipline imposed following the procedural dictates of TTA.[9] We recognize that some might feel that the TTA time limits and requirements though not by any means unduly long, might better be shortened to meet the exigencies of strike situations. This approach was in fact taken by the Court of Appeals in this case. However, we do not write legislation; the time periods involved are properly matters for legislative consideration and action.

Accordingly, as outlined above, we hold that the Crestwood Board of Education erred in discharging the subject teachers summarily, without prior notice and hearing, and without reference to the applicable provisions of TTA.

[9] The Legislature's action in 1967 amended MCLA 38.102; MSA 15.2002, well after the date of enactment of PERA, could be said to indicate a reaffirmation of legislative intent to preserve the discharge notice and hearing provisions in TTA. 1967 PA 216, §1.

V—*Contrary Contention*

The opinion of our learned Brother LEVIN, however, states:

> "Section 6 of the PERA empowers the officer or body generally having disciplinary authority over an employee to terminate the employment of or impose other discipline on an employee who strikes in violation of the PERA. In providing that an employee's request for a hearing to determine whether he did violate the PERA be filed within ten days *after* regular compensation has ceased or other discipline has been imposed, the Legislature manifested an intention that the officer or body may impose discipline without a prior hearing."

The conclusion reached in the first sentence is inferred in the second sentence from the following language in PERA § 6:

> "Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others * * * absents himself * * * shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing, with the officer or body having power to remove or discipline such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. * * *"

Nowhere in this PERA language is there any description of a removal procedure. All there is is a description of a procedure for a determination as to violation of the

PERA anti-strike provision *after* there has been a removal proceeding in no way described in PERA.

Consequently, the best that can be said for the conclusion in our Brother LEVIN's opinion that PERA provides a procedure for discharge is that it is based on an inference. It certainly is not set out in so many words in PERA.

So the first question is—can there be a repeal by implication where the conflicting provision proposed to substitute for a well-established and precise provision is no more than a possible precise interference? Let us recall the direct *Rathbun* reference to this:

> "[I]t will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, *unless it has done so in express terms* • • • ." (Emphasis added.)

But the second question is even more damaging—can there be an inference from the above quoted PERA language that not only is there a removal procedure specified but that what is specified is discharge without prior notice and hearing? Surely this is too much—a true nonsequitur.

Certainly the fact that an alleged striker has the right to contest the alleged violation of PERA within ten days after he has been disciplined, discharged or his pay stopped says nothing as to how his discipline or discharge was accomplished, *i.e.*, with or without prior notice or with or without prior hearing. This is the pertinent language of the act:

> "[The alleged striker] shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing • • • within 10 days after regular compensation of such em-

> ployee has ceased or other discipline has been imposed."

All it says is that after the alleged striker has been disciplined, he may request a hearing, nothing more—not a single word as to how the discipline was imposed.

Consequently, it is submitted this kind of an inference supplies no basis whatsoever to conflict with and repeal by implication a specific provision for the traditional prior notice and hearing provided in TTA.

In passing, it may be noted as well that before the force of the phrase "[n]otwithstanding the provisions of any other law", which Justice LEVIN heavily relies upon in his analysis, focuses on establishing that the described concerted action "shall be deemed to be [a] strike" and, possibly, to the right of the person to request a determination as to whether he was or was not in violation.

We also take note that the opinion of Justice LEVIN expresses a commendable concern that there be in Michigan under aegis of PERA/MERC, similar to the Federal pattern of NLRA/NLRB, a "unitary procedure for the discipline of public employees who strike." This is a concern, as Justice LEVIN's opinion points out, that this Court as a whole shares, and this specific opinion agrees with. However, in his opinion, Justice LEVIN has pushed this concern further than the Legislature has given any warrant, and at too great a cost in established human rights.

It must be recognized that there is at least one significant difference between the NLRA/NLRB and PERA/MERC patterns, that is that the Congress in establishing the self-contained NLRA/NLRB system specifically recognized and bottomed the system on the right to strike

to balance employer power and labor power.[10] As the United States Supreme Court noted in *Division 1287, Amalgamated Association of Street, Electric Railway & Motor Coach Employees v Missouri,* 374 US 74, 82; 83 S Ct 1657; 10 L Ed 2d 763 (1963), *reh den,* 375 US 870; 84 S Ct 29; 11 L Ed 2d 100 (1963):

> "Collective bargaining, with the right to strike at its core, is the essence of the federal scheme."

On the other hand, the Michigan Legislature in PERA §6 went back to the Hutchinson Act which was specifically "[a]n act to probihit strikes by certain public employees."[11] To compensate for the lack of strike power, the Legislature over the years has guaranteed to public employees specific rights and procedures, among them those outlined in TTA. These rights and procedures, to a greater or lesser extent, carried over with PERA.

Historically and legally, therefore, while PERA was a big step forward by the Legislature in responding to the constitutional mandate to establish a system of collective bargaining for public employees,[12] it is common knowledge that PERA did not in and of itself establish a clear, unified system but rather staked out a new system co-existing with an old system, with a murky gray area of operation

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[10] *See* 29 USC 157 which reads in pertinent part:

"Employees shall have the right to self-organization, to form, join, or assist labor organizatins, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* * * *." (Emphasis added.)

[11] 1965 PA 379.

[12] Const 1963, art 4, § 48.

and applicability in between them.[13] The all too vivid judicial history in recent years of conflicting and ineffectual relations to ever-worsening school labor relations has highlighted and increased public awareness and understanding of the legislative hiatus in the interlock between PERA and TTA.

Justice LEVIN has courageously applied his very considerable legal and forensic talents to terminate this legislative mish-mash. His opinion has produced a new order under the aegis of PERA/MERC, but at the cost of eliminating the important and traditional rights of notice and hearing before discharge and at the further cost of blinking at the recogized rules of statutory construction.

We concede that the result of our opinion is not as tidy as that of Justice LEVIN's opinion and leaves much for the Legislature to do.[14] We reach this result not out of any overwhelming reluctance to utilize the full potential of judicial power but through the recognition that the proper balance of administrative order and efficiency on the one hand, and personal rights on the other, necessary to meet the complex demands of teacher-school board relations at this time of extreme tension is not a matter that lends itself to the limited options of judicial construction of the material before us but requires the most comprehensive, as well as the wisest, employment of the Legislature' poli-

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[13] *See* for example, Detroit Free Press, March 7, 1975, p 8-A (Editorial).

[14] We are aware that in reaching this conclusion spelled out above, we outline a procedural system containing, potentially, some redundancy. For example, in cases where discharge proceedings are commenced solely on the basis of alleged participation in an unlawful strike, the question of participation in the strike can be raised *both* in the TTA hearing *and* in the PERA § 6 hearing. We do not, however, make legislation, we can only interpret and construe what we are given by the Legislature.

tical and drafting skills. As a matter of fact, the Legislature is this very moment vigorously and exhaustively examining the subject, and the media have expressed the hope that a new solution carefully balancing all the equities is in the making. Under these circumstances and at this time, we feel the Legislature is best equipped to tackle the larger policy decisions and this Court can better serve the public by solving this case on the fundamentals of legislative construction, pointing out such anomalies in the PERA/TTA interlock as this case has brought to our attention.

VI—*Teachers Remained Employees Under Tenure While on Strike*

The Crestwood School District further contends that the discharged teachers, by striking "discontinued their services" within the meaning of Art V, § 1 of the Teachers' Tenure Act, MCLA 38.111; MSA 15.2011,[15] thereby forfeiting the procedural safeguards of that Act. This is an issue which this Court specifically reserved for decision in *Shiffer v Board of Education of Gibraltar School Dist,* 393 Mich 190, 201-203; 224 NW2d 255 (1974).

We agree with Justice LEVIN's analysis on this point, in Section IV of this opinion, concluding that "by striking, the teachers did not cease to be employees". In addition,

[15] MCLA 38.111; MSA 15.2011, reads:

"No teacher on continuing tenure shall discontinue his services with any controlling board except by mutual consent, without giving a written notice to said controlling board at least 60 days before September first of the ensuing school year. Any teacher discontinuing his services in any other manner than as provided in this section shall forfeit his rights to continuing tenure previously acquired under this act."

we note that in this case there was a contractual employment relationship between the board and the teachers during the fall of 1974, though the specific terms of that contractual relationship were court-ordered, and that the teachers had actually been working on the job.[16] *School Dist for the City of Holland v Holland Education Association,* 380 Mich 314; 157 NW 2d 206 (1968) (Opinions of O'HARA, SOURIS and KELLY, JJ.). *Cf.* OAG 1969-1970, No. 4, 7404, p 150.

VII—*Probationary v Tenured Teachers*

The Crestwood School Board further contends that the circuit court and the Court of Appeals erred in their opinions in failing to distinguish between probationary and tenured teachers with respect to the applicability of the procedural provisions of TTA.

Article II, § 4 of the TTA, MCLA 38.84; MSA 15.1984 reads in its entirety as follows:

> "Articles 4, 5, and 6 shall not apply to any teacher deemed to be in a period of probation."

Articles 4 and 6 contain the hearing, review, and other procedural protections and the rights guaranteed by law to tenure teachers.

The fact that probationary teachers are not included in those specific sections does not mean, however, that probationary teachers have no procedural rights at all. As this Court has previously noted:

[16] "On October 8, 1974, Wayne County Circuit Judge Joseph G. Rashid ordered that the teachers return to work and that the Board implement the terms of its proposed salary schedule." Appellant's Brief, p 1.

> "... the intent of the *entire* [Teachers' Tenure] act was to eliminate capricious and arbitrary employment policies of local school boards. *This includes the probationary as well as the tenure period of employment.*" [Latter emphasis added.] *Munro v Elk Rapids Schools,* 383 Mich 661, 688, 691; 178 NW2d 450 (1970) (Dissenting opinion of T. G. KAVANAGH, J.), later *aff'd* in full in *Munro v Elk Rapids Schools,* 385 Mich 618; 189 NW2d 224 (1971) (On Rehearing)

In guarding against such arbitrary and capricious employment policies and, in light of the lack of legislative directive on the issue of the proper procedure to be followed in disciplining or discharging probationary teachers, the courts are forced to act to protect teachers from unreasonable and, potentially, unconstitutional dismissal.[17] *Cf. Hortonville Education Association v Hortonville Joint School Dist,* — Wisc — ; — NW2d — ; 594 GERR F-1 (2-24-75).

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[17] We note that the United States Supreme Court has not found an absolute constitutional right of a probationary teacher to due process protections in dismissal cases. *See Board of Regents of State Colleges v Roth,* 408 US 564; 92 S Ct 2701; 33 L Ed 2d 548 1972); *Perry v Sinderman,* 408 US 593; 92 S Ct 2694; 33 L Ed 2d 570 (1972). However, the Supreme Court has noted that due process *does* accord protection where, as here, the State, acting through the school administration, makes "any charge against him [the teacher] that might seriously damage his standing and associations in his community * * *. For '[w]here a persons good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'" 408 US 564, 573.

As the Supreme Court of Wisconsin has ruled, referring to *Roth, supra,*

> "It is apparent that such charges [discharge for strike activities] could detrimentally affect an individual's reputation in the labor market and thereby significantly undermine his opportunities for re-employment. Due process requires a notice and hearing and an opportunity for the teachers to clear themselves of such charges." *Hortonville Education Association v Hortonville Joint School Dist,* — Wisc —; NW2d —; 594 GERR F-1, F-5 (2-24-75).

The Court of Appeals has previously acted in this regard to guarantee the right of review of dismissal to probationary teachers though TTA does not specifically make provision for such review. *Caddell v Ecorse Board of Education,* 17 Mich App 632, 635; 170 NW2d 277 (1969). Such review does not involve the same level of employment termination protection afforded tenure teachers by statute.[18] Tenure teachers may only be discharged for "reasonable and just cause". MCLA 38.101; MSA 15.2001. The discharge of a probationary teacher, however, in the absence of specific legislation or contractual provision on point, is permissible only where it is neither unreasonable nor arbitrary nor beyond the scope of the board's authority. *Caddell, supra, 636.*

Similarly, we hold today, in the absence of specific legislation on point, that probationary teachers have a right to notice and a hearing prior to discharge. Again, probationary teachers are not thereby converted into tenure teachers by virtue of this right — the hearing, if requested promptly, would only be concerned with the issues of whether the employment termination was arbitrary and unreasonable, or whether it was action outside the scope of the board's authority, rather than the broader issues of "reasonable and just cause" for discharge in the case of tenure teachers who have been given broader statutory protection.

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[18] "Assuming the necessity of eliminating 'capricious and arbitrary employment policies' of local schol boards, that requirement can be satisfied by forcing the school board to supply a reason for not rehiring and to afford the teacher an opportunity to respond and be heard. The difference between probationary and tenure teachers can still be preserved if in the probationary case courts are permitted 'to respect bases for non-retention enjoying minimal factual support and bases for non-retention supported by subtle reasons.'" (Footnote omitted.) "1970 Annual Survey of Michigan Law—Local Government," 17 Wayne L Rev 599, 615 (1971).

Accordingly, we hold that the Crestwood Board of Education erred, *inter alia,* in discharging *both* its probationary and tenured teachers without prior notice and hearings.

VIII—*Circuit Court Injunction Properly Issued*

The board also contends that, in any case, the teachers were not entitled to equitable relief in the form of an injunction due to their lack of "clean hands" in violating a previous circuit court injunctive order of October 22, 1974. The teachers respond, *inter alia,* that appellant school board likewise violated injunctive orders in the course of these protracted proceedings and accordingly, has no cause to complain.

The Court of Appeals agreed with the teachers, noting that "[a]ll three judges in the trial court agreed that both parties were in open, flagrant defiance and in violation of [Judge Rashid's] orders." — Mich App — , — [Slip Opinion p 8]. Dissenting Judge Rashid, on the circuit court, ruling directly on the "clean hands" question, explicitly opined:

> "I feel that both sides have been in error on this score.* * * The fact is that both sides actually violated the terms of the [October 8 and 22, 1974] order."

We will not second-guess the courts below, especially the trial court which has had direct contract with this litigation throughout its course, on this issue. As we have previously ruled in *Thompson v Enz,* 385 Mich 103, 110; 188 NW2d 579 (1971):

> "[A]s a general rule, equity will administer such relief as the nature, rights, facts, and exigencies of the case demand at the close of the trial or at the time of the making of the decree." Quoting from 27 Am Jur 2d, Equity, §248, p 818.

The circuit court acted within its discretion in issuing its injunction and order of January 10, 1975.

IX—*Court of Appeals Compulsory Arbitration Order Improper*

We do not believe that the *sua sponte* order of the Court of Appeals requiring compulsory arbitration was a proper exercise of judicial discretion in this case.

X—*Conclusion*

We hold, as did the circuit court majority and the Court of Appeals, that appellee teachers were discharged in a procedurally improper manner.

Accordingly, we affirm the Circuit Court order of January 10, 1975. We further affirm the conclusion, except as to compulsory arbitration, but not the analysis of the Court of Appeals. This matter is remanded to Wayne Circuit Court for further proceedings not inconsistent with this opinion.

No costs, a public question being involved.

T. M. KAVANAGH and SWAINSON concurred with WILLIAMS, J.